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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 412

AUBRY WILLIAMS, PETITIONER,

vs.

STATE OF GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED JULY 9, 1954

CERTIORARI GRANTED OCTOBER 18, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 412

AUBRY WILLIAMS, PETITIONER,

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STATE OF GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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1-3 In Superior Court of Fulton County

THE STATE OF GEORGIA

v.

AUBRY WILLIAMS

No. 68,769

Indictment for Murder in Fulton Superior Court.

Verdict of Guilty, March Term, 1953,

Rendered on the 10th day of March, 1953.

EXTRAORDINARY MOTION FOR A NEW TRIAL

Comes now the defendant, Aubry Williams, at this November Term, 1953, of said Court, and moves the Court for a new trial, upon the following extraordinary grounds, to wit:

GROUND ONE. Because movant was, on his trial for the offense of murder, at the March Term, 1953, of Fulton Superior Court, denied the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (section 1-815, Code of 1933), which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Movant contends that the jury panel put upon him on his trial was not fairly and properly impaneled and was an illegal jury and ought not to have been put upon him. Movant avers that the jurors so put upon him were taken from the jury list of Fulton County, Georgia, which was prepared from the books of the Tax Receiver of Fulton County, Georgia, pursuant to the provisions of Section 50-106, Code of 1933, which provides:

"Biennially, or, if the judge of the Superior Court shall direct, triennially on the first Monday in August, or within 30 days thereafter the board of jury commissioners shall revise the jury lists.

4 "The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and

shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

Section 59-101, Code of 1933, provides: "There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor; Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners."

Under the foregoing statute, the Judge of the Superior Court is required to appoint six "discreet" persons to such board.

Article VI, Section XVI, Paragraph II of the Constitution of the State of Georgia (Section 2-5102, Code of 1933, Ann. Supp.) provides:

"The General Assembly shall provide by law for the selection of the most experienced, intelligent and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless, the grand jurors shall be competent to serve as traverse jurors. The General Assembly shall have the power to require jury service of women also, under such regulations as the General Assembly may prescribe."

Movant contends that the statutes codified as Sections 59-101 and 59-106, Code of 1933, while constitutional, have been applied in an unconstitutional manner by action of the authorities of the State of Georgia as to him because:

(a) Movant is a Negro;

(b) Movant was on trial for the murder of a white man.

(c) The statutes so codified made no provision for the appointment of a person of color as a jury commissioner and never in the history of Fulton County, Georgia, has a Negro been appointed to serve as a jury commissioner, and no member of the same race as defendant has ever been given the opportunity to determine the

qualifications of the persons whose names appear on the Tax Receiver's Digest from which said jury commissioners are required to select jurors;

(d) In selecting persons from the Tax Receiver's Digest for service as jurors, the names of persons so selected having been placed in the traverse jury box and constituting the names in the jury box from which the panel put upon movant on his trial were drawn, the jury commissioners of Fulton County acted upon information from the Atlanta City Directory, the Atlanta Telephone Directory, and personal knowledge of individual jury commissioners. Residents of certain areas in the City of Atlanta and Fulton County were considered by the jury commissioners as unsuitable for selection on account of the nature of such area as being populated by the poorer class of citizens, and rejected because residing in such areas. Negroes residing in and near the City of Atlanta, in Fulton County, live in well defined and well known areas not populated by white
6 people and Negroes are considered by white jury commissioners as of the poorer class of citizens and rejected as jurors because of their color and residence;

(e) The systematic exclusion of citizens of the colored race from the board of commissioners solely because of their race and color is discriminatory and a denial to movant of equal protection of law, in violation of the fourteenth amendment to the Constitution of the United States;

(f) The fact that no negro has ever been appointed as a commissioner in Fulton County, Georgia, is evidence of systematic exclusion of citizens of the colored race from duty as jury commissioners, solely because of their race and color.

Movant contends that the proportionate number of negro traverse jurors to white traverse jurors in the jury box has been excessively small, both in comparison with the proportionate number of negro citizens to white citizens in Fulton County as a whole and in proportion to the comparative number of negro citizens to white citizens on the Tax Receiver's Digest and that this fact is the result of a deliberate and systematic exclusion of proportionate numbers of the negro race from jury service and that such exclusion denies the movant equal protection of the laws, contrary to the above quoted provisions of the Constitution of the United States in that it designedly failed to afford him a proportionate number of citizens of his own race, and a fair selection thereof before whom his cause might be tried.

The names of persons of the white and negro races were placed in the traverse jury box from which the panel placed upon movant on his trial was drawn by the names of the white citizens being placed therein on white tickets, or slips of paper and the names

of the negro citizens placed therein on yellow colored tickets, or slips of paper.

The proportionate number of negro citizens to white citizens actually summoned on panels for jury duty is less, regularly
7 and systematically, than the proportionate number of negro citizens to white citizens on the list of traverse jurors as a whole, and as contained in the trave se jury box. By reason of the names of negro citizens in the jury box being written on yellow tickets, while the names of white jurors are printed on white tickets, the operations of the mathematical laws of chance may be defeated, and it is made possible to keep the number of negro petit jurors summoned for jury duty within the six peremptory challenges allowed to the State in any felony case, and well under the ten such allowed to the State on the trial of a capital felony indictment, so that counsel for the State may in every case where a negro is on trial absolutely assure that no negro will be sworn as a juror.

Movant contends that such application of the above quoted laws of the State of Georgia by the authorities of the State of Georgia and Fulton County, generally, and specifically to the panel of jurors put upon movant on his trial, denies to negroes, and denied to movant, the equal protection of the laws by retaining in the hands of those authorities the means of insuring that no negro ever serve on a jury sworn to try the cause of a member of the negro race, which means were exercised upon movant's trial as will appear herein.

Movant shows that in the reported case of Watkins v. State, 199 Ga. 81, public speeches of the Solicitor General of another county here referred to, showing that he by design exercised the State's peremptory challenges to prevent negro jurors from serving on the trial of any cause in his court, and that this means is known to and available to all solicitors general, and may be made effective by control of the number of negro petit jurors summoned for jury service.

Movant shows that on the 18th day of February, 1953, the Fulton County Traverse Jury Box contained white tickets bearing the names of white citizens, and yellow tickets bearing the names
8 of negro citizens, placed therein by the jury commissioners of Fulton County after being selected as traverse jurors in the manner stated.

His Honor, Jesse M. Wood, one of the Judges of the Superior Court of Fulton County, presiding during the January-February term, 1953, of Fulton Superior Court, on the 18th day of February, 1953, drew from one of the compartments of the traverse jury box some number of tickets in excess of 120, bearing names to serve

as petit jurors for the trial of civil and criminal cases in Fulton Superior Court during the week of March 9, 1953.

The tickets so drawn out by said Judge were placed in the hands of a deputy sheriff, who handed them to a deputy clerk for listing, and following listing, returned the tickets to the Judge, who placed them in the other compartment of the traverse jury box, all handling and listing occurring in the presence of the Judge. Said Judge did not personally verify the listing of names by the deputy clerk by comparison with the tickets, nor the total number of names on the list by a count of the tickets.

After the summoning of the petit jurors whose names appeared on the list, and after the excusing of some number thereon, there were organized 10 panels of 12 petit jurors for the trial of civil and criminal cases in Fulton Superior Court during the week of March 9, 1953, or a total of 120 jurors. Four of these jurors were negroes.

Movant was tried March 10, 1953.

Panels 6, 7, 8, 9, and 10, each of 12 petit jurors, were assigned to serve in the criminal division of said court, and all of the four negro petit jurors were included in these panels. No negro petit jurors were assigned to the civil division.

After a panel of 48 jurors, from those petit jurors assigned to serve in the criminal division, were put upon movant, and upon their voir dire, thirteen petit jurors so put upon movant
9 were set aside for cause, among them three of the four negro petit jurors, leaving one negro among the petit jurors empaneled and found competent to try movant.

This negro petit juror, whose name appeared four on the list of the panel of competent jurors as called over by the clerk, upon the calling of his name was challenged peremptorily by the State, being the first juror thus challenged by the State, leaving no negro petit jurors empaneled and competent to try movant.

Movant contends that the circumstances of the selection, drawing, summoning, organizing, empaneling, and challenging of the jury sworn to try movant, show that he was discriminated against at every stage and denied the equal protection of the laws, in violation of the provision of the Fourteenth Amendment to the Constitution of the United States, quoted above.

Movant avers that he was harmed by the deliberate exclusion as aforesaid of negroes from the jury which was sworn to try him for the offense of murder because:

(a) A member or members of his own race might have given due regard to movant's statement made on his trial wherein he denied any connection with the offense for which he was being tried;

(b) A member or members of his own race, had they voted to convict movant, might through understanding of movant's heredity

and environment, and of motivations among members of their race, have voted to recommend movant to the mercy of the court, and persuaded the jury to adopt their viewpoint, thus binding the court to pronounce a sentence of life imprisonment upon movant.

Movant avers that he and his counsel have exercised due diligence in presenting this motion for a new trial and this ground thereof, and movant attaches hereto as Exhibits "A", "B" and "C" to this ground his own affidavit and affidavits of his counsel setting forth the circumstances under which the facts herein set forth came to their attention.

Movant contends that by reason of the unconstitutional application as to him of the quoted laws of the State of Georgia, and of sections 59-108, 59-701, 50-801, and 59-802, Code of 1933 and the Ann. Supp. thereto, he should be granted a new trial.

Exhibit "A" to Motion for New Trial

(Ground One)

[Title omitted]

Affidavit

Now comes Aubry Williams, defendant in said case, and, being first duly sworn, on oath deposes and says that he makes this affidavit to accompany his extraordinary motion for a new trial based on constitutional grounds.

Deponent further says that he did not at the time of his trial in the Superior Court of Fulton County, Georgia, on March 10, 1953, under said indictment, have any knowledge of or information concerning the selection, drawing, organizing, and empaneling of the jury panel put upon him on his trial, but assumed that said jury was a legal jury.

Deponent further says that he knew of no facts affecting the legality of the jury panel, or of the jury sworn to try deponent prior to the swearing of said jury, nor since, until the date of the execution of this affidavit to accompany his extraordinary motion for a new trial complaining of the illegality of said jury panel put upon him.

Aubry Williams,
Defendant.

Duly sworn to. Jurat omitted in printing.

12 EXHIBIT "B" TO MOTION FOR NEW TRIAL

(Ground One)

[Title omitted]

AFFIDAVIT

Personally before the undersigned officer authorized to administer oaths comes Carter Goode, who being first duly sworn, on oath deposes and says that he is an attorney at law of the Atlanta, Georgia, bar, and was sole counsel for Aubry Williams on his trial for the offense of murder in the Superior Court of Fulton County, Georgia, on the 10th day of March, 1953, under indictment No. 68.769.

Deponent further says that he did not know of the facts set out in the first and second grounds of the extraordinary motion for a new trial of which this affidavit is a part before the trial and before the verdict in said case, and that the same could not have been discovered by him in the exercise of ordinary diligence.

Deponent further says that the defendant, Aubry Williams, denied committing the offense with which he was charged in the indictment, and deponent devoted his time and efforts to ascertaining the nature of the evidence to be presented by the State of Georgia upon the trial.

Deponent further says that he in good faith accepted the panel of jurors put upon defendant on said trial as being a lawful panel of jurors.

13 Deponent makes this affidavit to accompany the extraordinary motion for a new trial in said case, as a part of said motion.

CARTER GOODE

Duly sworn to. Jurat omitted in printing.

14 EXHIBIT "C" TO MOTION FOR NEW TRIAL

(Ground One)

[Title omitted]

AFFIDAVIT

Personally before the undersigned officer authorized to administer oaths comes Ellis M. Creel, who being first duly sworn, on oath deposes and says that he is an attorney at law of the Atlanta, Georgia, bar, practicing his profession in association with Carter Goode, Esquire, of said bar, under the firm name "Goode and Creel."

Deponent further says that the said Carter Goode, Esq., was

already counsel for Aubry Williams, whose trial under indictment No. 68,769, was pending in Fulton Superior Court, when his association with the said Carter Goode, Esquire, began in January, 1953.

Deponent further says that he did not participate in the preparation for the trial of said Williams, which took place on March 10, 1953, and had no knowledge of any of the details of the case nor of the nature or extent of the preparations, nor did deponent take any part in the trial.

Deponent further says that he has not acquainted himself with any of the facts, nor with the legal questions involved, has not been called upon to do so by said Williams or by the said Carter Goode, Esquire, and has had no knowledge concerning said case except generally of its status in the courts.

Deponent makes this affidavit to accompany the extraordinary motior for a new trial in said case, as a part of said motion.

ELLIS M. CREEL.

15 *Duly sworn to. Jurat omitted in printing.*

16 *Ground Two.* Because movant was, on his trial for the offense of murder, at the March Term, 1953, of Fulton Superior Court, and conviction, denied due process of law, in violation of Section I of the fourteenth amendment to the Constitution of the United States (Section 1-815, Code of 1933), which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Movant contends that the jury panel put upon him on his trial was not fairly and properly empaneled and was an illegal jury and ought not to have been put upon him. Movant avers that the jurors so put upon him were taken from the jury list of Fulton County, Georgia, which was prepared from the books of the Tax Receiver of Fulton County Georgia, pursuant to the provisions of Section 59-106, Code of 1933, which provides:

"Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

"The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall

select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body
17 of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

Section 59-101, Code of 1933, provides:

"There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointments for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor; Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners."

Under the foregoing statute, the Judge of the Superior Court is required to appoint six "discreet" persons to such board.

Article VI, Section XVI, Paragraph II of the Constitution of the State of Georgia (Section 2-5102, Code of 1933, Ann. Supp.) provides:

"The General Assembly shall provide by law for the selection of the most experienced, intelligent and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless, the grand jurors shall be competent to serve as traverse jurors. The General Assembly shall have the power to require jury service of women also, under such regulations as the General Assembly may prescribe."

Movant contends that the statutes codified as Sections 59-101 and 59-106, Code of 1933, while constitutional have been applied in an unconstitutional manner by action of the authorities
18 of the State of Georgia as to him because:

(a) Movant is a negro.

(b) Movant was on trial for the murder of a white man.

(c) The statutes so codified made no provision for the appointment of a person of color as a jury commissioner and never in the history of Fulton County, Georgia, has a negro been appointed to serve as a jury commissioner, and no member of the same race as defendant has ever been given the opportunity to determine the qualifications of the persons whose names appear on the Tax Re-

ceiver's Digest from which said jury commissioners are required to select jurors;

(d) In selecting persons from the Tax Receiver's Digest for service as jurors, the names of persons so selected having been placed in the traverse jury box and constituting the names in the jury box from which the panel put upon movant on his trial were drawn, the jury commissioners of Fulton County acted upon information from the Atlanta City Directory, the Atlanta Telephone Directory, and personal knowledge of individual jury commissioners. Residents of certain areas in the City of Atlanta and Fulton County were considered by the jury commissioners as unsuitable for selection on account of the nature of such area as being populated by the poorer class of citizens, and rejected because residing in such areas. Negroes residing in and near the City of Atlanta in Fulton County, live in well defined and well known areas not populated by white people and negroes are considered by white jury commissioners as of the poorer class of citizens and rejected as jurors because of their color and residence;

(e) The systematic exclusion of citizens of the colored race from the board of commissioners solely because of their race and color is discriminatory and a denial to movant of due process of law in violation of the fourteenth amendment to the Constitution of the United States;

(f) The fact that no negro has ever been appointed as a
19 commissioner in Fulton County, Georgia, is evidence of systematic exclusion of citizens of the colored race from duty as jury commissioners, solely because of their race and color.

Movant contends that the proportionate number of negro traverse jurors to white traverse jurors in the jury box has been excessively small, both in comparison with the proportionate number of negro citizens to white citizens in Fulton County as a whole and in proportion to the comparative number of negro citizens to white citizens on the Tax Receiver's Digest and that this fact is the result of a deliberate and systematic exclusion of proportionate numbers of the negro race from jury service and that such exclusion denied the movant due process of law contrary to the above quoted provisions of the Constitution of the United States in that it designedly failed to afford him a proportionate number of citizens of his own race, and a fair selection thereof before whom his cause might be tried.

The names of persons of the white and negro races were placed in the traverse jury box from which the panel placed upon movant on his trial was drawn by the names of the white citizens being placed therein on white tickets, or slips of paper and the names of the negro citizens placed thereon on yellow colored tickets, or slip of paper.

The proportionate number of negro citizens to white citizens actually summoned on panels for jury duty is less, regularly and systematically, than the proportionate number of negro citizens to white citizens on the list of traverse jurors as a whole, and as contained in the traverse jury box. By reason of the names of negro citizens in the jury box being written on yellow tickets, while the names of white jurors are printed on white tickets, the operations of the mathematical laws of chance may be defeated, and it is made possible to keep the number of negro petit jurors summoned for jury duty within the six peremptory challenges allowed to
20 the State in any felony case, and well under the ten such allowed to the State on the trial of a capital felony indictment, so that counsel for the State may in every case where a negro is on trial absolutely assure that no negro will be sworn as a juror.

Movant contends that such application of the above quoted laws of the State of Georgia by the authorities of the State of Georgia and Fulton County, generally, and specifically to the panel of jurors put upon movant on his trial, denies to negroes, and denied to movant due process of law by retaining in the hands of those authorities the means of insuring that no negro ever serve on a jury sworn to try the cause of a member of the negro race, which means were exercised upon movant's trial as will appear herein.

Movant shows that in the reported case of Watkins v. State, 199 Ga. 81, public speeches of the Solicitor General of another county were referred to, showing that he by design exercised the State's peremptory challenges to prevent negro jurors from serving on the trial of any cause in his court, and that this means is known to and available to all solicitors general, and may be made effective by control of the number of negro petit jurors summoned for jury service.

Movant shows that on the 18th day of February, 1953, the Fulton County Traverse Jury Box contained white tickets bearing the names of negro citizens, and yellow tickets bearing the names of negro citizens, placed therein by the jury commissioners of Fulton County after being selected as traverse jurors in the manner stated.

His Honor, Jesse M. Wood, one of the Judges of the Superior Court of Fulton County, presiding during the January-February term, 1953, of Fulton Superior Court, on the 18th day of February, 1953, drew from one of the compartments of the traverse jury box some number of tickets in excess of 120, bearing names to serve as petit jurors for the trial of civil and criminal cases in Fulton
21 Superior Court during the week of March 9, 1953.

The tickets as drawn out by said Judge were placed in the hands of a deputy sheriff, who handed them to a deputy clerk for listing, and following listing, returned the tickets to the Judge, who placed them in the other compartment of the traverse jury box, all

handling and listing occurring in the presence of the judge. Said Judge did not personally verify the listing of names by the deputy clerk by comparison with the tickets, nor the total number of names on the list by a count of the tickets.

After the summoning of the petit jurors whose names appeared on the list, and after the excusing of some number thereof, there were organized 10 panels of 12 petit jurors for the trial of civil and criminal cases in Fulton Superior Court during the week of March 9, 1953, or a total of 120 jurors. Four of these jurors were negroes.

Movant was tried March 10, 1953.

Panels 6, 7, 8, 9, and 10, each of 12 petit jurors, were assigned to serve in the criminal division of said court, and all of the 4 negro petit jurors were included in these panels. No negro petit jurors were assigned to the civil division.

After a panel of 48 jurors, from those petit jurors assigned to serve in the criminal division, were put upon movant, and upon their voir dire, 13 petit jurors so put upon movant were set aside for cause, among them 3 of the 4 negro petit jurors, leaving 1 negro among the petit jurors empaneled and found competent to try movant.

This negro petit juror, whose name appeared fourth on the list of the panel of competent jurors as called over by the clerk, upon the calling of his name was challenged peremptorily by the State, being the first juror thus challenged by the State, leaving no negro petit jurors empaneled and competent to try movant.

Movant contends that the circumstances of the selection, drawing, summoning, organizing, empaneling and challenging of the
22 jury sworn to try movant, show that he was discriminated against at every stage and denied the equal protection of the laws, in violation of the provision of the Fourteenth Amendment to the Constitution of the United States, quoted above.

Movant avers that he was harmed by the deliberate exclusion as aforesaid of negroes from the jury which was sworn to try him for the offense of murder because:

(a) A member or members of his own race might have given due regard to movant's statement made on his trial wherein he denied any connection with the offense for which he was being tried;

(b) A member or members of his own race, had they voted to convict movant, might through understanding of movant's heredity and environment, and of motivations among members of their race, have voted to recommend movant to the mercy of the court, and persuaded the jury to adopt their viewpoint, thus binding the court to pronounce a sentence of life imprisonment upon movant.

Movant avers that he and his counsel have exercised due diligence in presenting this motion for a new trial and this ground thereof,

and movant attaches hereto as Exhibits "A," "B," and "C," to this ground his own affidavit and affidavits of his council setting forth the circumstances under which the facts herein set forth came to their attention.

Movant contends that by reason of the unconstitutional application as to him of the quoted laws of the State of Georgia, and of Sections 59-108, 59-701, 59-801, and 59-802, Code of 1933, and the Ann. Supp. thereto, he should be granted a new trial.

Wherefore, movant prays that these, his extraordinary grounds for a new trial, be inquired of by the court, approved, and allowed, and that a new trial be granted him.

CARTER GOODE,
ELLIS M. CREEL,
Movant's Attorneys.

23 EXHIBIT "A" TO MOTION FOR NEW TRIAL

(Ground Two)

[Title omitted]

AFFIDAVIT

Now comes Aubry Williams, defendant in said case and, being first duly sworn, on oath deposes and says that he makes this affidavit to accompany his extraordinary motion for a new trial based on constitutional grounds.

Deponent further says that he did not at the time of his trial in the Superior Court of Fulton County, Georgia, on March 10, 1953, under said indictment, have any knowledge of or information concerning the selection, drawing, organizing, and empaneling of the jury panel put upon him on his trial, but assumed that said jury was a legal jury.

Deponent further says that he knew of no facts affecting the legality of the jury panel, or of the jury sworn to try deponent prior to the swearing of said jury, nor since, until the dates of the execution of this affidavit to accompany his extraordinary motion for a new trial complaining of the illegality of said jury panel put upon him.

AUBRY WILLIAMS,
Defendant.

Duly sworn to. Jurat omitted in printing.

24 EXHIBIT "B" TO MOTION FOR NEW TRIAL

[Title omitted]

AFFIDAVIT

Personally appeared before the undersigned officer authorized to administer oaths comes Carter Goode, who being first duly sworn, on oath deposes and says that he is an attorney at law of the Atlanta, Georgia, bar, and was sole counsel for Aubry Williams on his trial for the offense of murder in the Superior Court of Fulton County, Georgia, on the 10th day of March, 1953, under Indictment No. 68,769.

Deponent further says that he did not know of the facts set out in the first and second grounds of the extraordinary motion for a new trial of which this affidavit is a part before the trial and before the verdict in said case, and that the same could not have been discovered by him in the exercise of ordinary diligence.

Deponent further says that the defendant, Aubry Williams, denied committing the offense with which he was charged in the indictment, and deponent devoted his time and efforts to ascertaining the nature of the evidence to be presented by the State of Georgia upon the trial.

Deponent further says that he in good faith accepted the panel of jurors put upon the defendant on said trial as being a lawful panel of jurors.

Deponent makes this affidavit to accompany the extraordinary motion for a new trial in said case, as a part of said motion.

CARTER GOODE

25 *Duly sworn to. Jurat omitted in printing.*

26 EXHIBIT "C" TO MOTION FOR NEW TRIAL

[Title omitted]

AFFIDAVIT

Personally before the undersigned officer authorized to administer oaths comes Ellis M. Creel, who being first duly sworn, on oath deposes and says that he is an attorney at law of the Atlanta, Georgia, bar, practicing his profession in association with Carter Goode, Esquire, of said bar, under the firm name "Goode and Creel."

Deponent further says that the said Carter Goode, Esq., was already counsel for Aubry Williams, whose trial under indictment No. 68769, was pending in Fulton Superior Court, when his association with the said Carter Goode, Esquire, began in January, 1953.

Deponent further says that he did not participate in the preparation for the trial of said Williams, which took place on March 10, 1953, and had no knowledge of any of the details of the case nor of the nature or extent of the preparations, nor did deponent take any part in the trial.

Deponent further says that he has not acquainted himself with any of the facts, nor with the legal questions involved, has not been called upon to do so by said Aubry Williams or by the said Carter Goode, Esquire, and has had no knowledge concerning said case except generally of its status in the courts.

Deponent makes this affidavit to accompany the extraordinary motion for a new trial in said case, as a part of said motion.

ELLIS M. CREEL.

27 *Duly sworn to. Jurat omitted in printing.*

28 In Superior Court of Fulton County

[Title omitted]

ORDER TO SHOW CAUSE—Filed December 1, 1953

The within and foregoing extraordinary motion for a new trial having been presented, read and considered, it is ordered that the same be filed.

It is further ordered that the State of Georgia by Paul Webb, Sr., Solicitor General, Fulton Superior Court, Atlanta Judicial Circuit, show cause before me at 404 Fulton County Court House at 3:00 P. M., on the 21 day of December, 1953, why said motion should not be granted. Let evidence be presented upon the hearing by parole, affidavit, or documentary evidence.

It is further ordered that the State of Georgia be served with a copy of this motion, and order, by serving Paul Webb, Sr., Solicitor General, Fulton Superior Court, Atlanta Judicial Circuit, instanter; and that this order act as a supersedeas until the further order of the court.

This 1st day of Dec., 1953.

E. E. ANDREWS,
Judge Fulton Superior Court, Atlanta Judicial Circuit.

[File endorsement omitted.]

SERVICE OF MOTION AND ORDER (Omitted in printing)

29-32 In Superior Court of Fulton Coun'y

ORDER DISMISSING MOTION—Jan. 18, 1954

The above and foregoing extraordinary motion for new trial coming on regularly for hearing, and upon motion of the Solicitor General, the same is hereby dismissed for the reason that the grounds of the motion did not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion, that such motion is not [sic] good as an extraordinary motion and cannot be equally entertained as such.

E. E. ANDREWS,
Judge, S. C. A. C.

33 In Superior Court of Fulton County

BILL OF EXCEPTIONS—Filed Feb. 24, 1954

Be it remembered that on the 10th day of March, 1953, at the regular March term, 1953, of the Superior Court of Fulton County, before the Honorable E. E. Andrews, Judge, then and there presiding, there came on to be tried the case of the State of Georgia against Aubry Williams, the same being an indictment wherein the said Aubry Williams was charged with the offense of murder.

Be it further remembered that after evidence had been introduced and both sides had closed, the jury on the 10th day of March, 1953, returned a verdict finding the said Aubry Williams guilty of murder, without a recommendation of mercy.

Be it further remembered that said defendant in regular course and within the time prescribed by law filed his motion for a new trial, amended the same, excepted to the judgment by said the Honorable E. E. Andrews, Judge, overruling said motion for a new trial, and by writ of error to the Supreme Court of Georgia had a review of said judgment by said court in case No. 18,348, Williams v. The State, decided October 14, 1953.

Be it further remembered that the remittitur from the Supreme Court of Georgia was duly transmitted to the Clerk of Fulton Superior Court, and the judgment of the Supreme Court of Georgia affirming the said judgment overruling said motion for a new trial was made the judgment of Fulton Superior Court, and said defendant was on the 23rd day of November, 1953, sentenced to death by electrocution.

Be it further remembered that on the 1st day of December, 1953, during the regular November term, 1953, of the Superior Court of Fulton County, said defendant presented to the Honorable E. E. Andrews, Judge presiding as aforesaid, his extraordinary motion for a new trial, when and whereupon on said 1st day of December,

1953, said Judge made and entered his order as follows, omitting formal parts:

34 "The within and foregoing extraordinary motion for a new trial having been presented, read and considered, it is ordered that the same be filed.

"It is further ordered that the State of Georgia, by Paul Webb, Sr., Solicitor General, Fulton Superior Court, Atlanta Judicial Circuit, show cause before me at 404 Fulton County Court House at 3:00 p. m. on the 21 day of December, 1953, why said motion should not be granted. Let evidence be presented upon the hearing by parole, affidavit, or documentary evidence.

"It is further ordered that the State of Georgia be served with a copy of this motion, and order, by serving Paul Webb, Sr., Solicitor General, Fulton Superior Court, Atlanta Judicial Circuit, instanter; and that this order act as a supersedeas until the further order of the court.

"This 1st day of December, 1953."

Be it further remembered that the said extraordinary motion for a new trial was duly and regularly continued for hearing until the 18th day of January, 1954, when and whereupon on said 18th day of January, 1954, said judge made and entered his order and judgment dismissing said extraordinary motion for a new trial, as follows:

"The above and foregoing extraordinary motion for new trial coming on regularly for hearing, and upon motion of the Solicitor General, the same is hereby dismissed for the reason that the grounds of the motion do not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion, that such motion is not good as an extraordinary motion and can not be legally entertained as such.

"This the 18th day of Jan., 1954."

To which said order and judgment of the court dismissing said extraordinary motion for a new trial, the defendant, Aubry Williams, then and there excepted, now excepts, and assigns the same as error as being contrary to law.

35 Aubry Williams, defendant on the trial of said case and movant in said extraordinary motion for a new trial names himself as plaintiff in error in this his bill of exceptions, and names the State of Georgia as defendant in error.

And now comes plaintiff in error on this 15th day of February, 1954, and within the time prescribed by law presents to the Honorable E. E. Andrews, Judge as aforesaid, this his bill of exceptions, and asks that the same may be signed and certified in order that said case may be carried to the Supreme Court of Georgia,

in order that the errors herein alleged to have been committed may be considered and corrected.

Plaintiff in error specifies as material to a clear understanding of the errors complained of the following portions of the record, viz.:

1. The indictment, numbered 68,769, together with all entries thereon, with the plea of not guilty and the verdict of the jury entered thereon dated March 18, 1953.

2. The extraordinary motion for a new trial, and all ordered and entries thereon, with order dismissing said extraordinary motion for a new trial, dated January 18, 1954.

3. The sentence of the court, pronounced November 23, 1953.

The Supreme Court of Georgia has jurisdiction in this case of conviction of a capital felony. Constitution of the State of Georgia of 1945, Article VI, Section II, Paragraph IV (Code, Section 2-3704).

Plaintiff in error most respectfully submits this his bill of exceptions.

CARTER GOODE,
ELLIS M. CREEL,
Attorneys for Plaintiff in Error.

36 JUDGE'S CERTIFICATE

I do hereby certify that the foregoing bill of exceptions is true, and contains and specifies all of the record material to a clear understanding of the errors complained of, and the Clerk of the Superior Court of Fulton County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the next term of the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

I further certify that before certifying this bill of exceptions reasonable notice was given to counsel for the defendants in error, and opportunity afforded them to be heard on the question whether this bill of exceptions is correct and complete, and that said counsel were present at the signing of this certificate, or waived their presence.

Let the filing of the bill of exceptions and this certificate in the office of the Clerk of the Superior Court of Fulton County act as a supersedeas until the further order of the court.

This 15th day of February, 1954.

E. E. ANDREWS,
Judge, Fulton Superior Court,
Atlanta Judicial Circuit.

ACKNOWLEDGMENT OF SERVICE (Omitted in printing)

37

EXHIBIT

The within and foregoing bill of exceptions has been exhibited to me before presentation to the judge for certification, and I have examined the same and have no objection to the signing thereof. I waive my presence at the presentation and signing of the certificate on said bill of acceptance.

This 15th day of February, 1954.

PAUL WEBB, SR.,
Solicitor General,
Fulton Superior Court,
Atlanta Judicial Circuit.
By CHARLIE O. MURPHY,
Counsel for Defendant in Error.

38 In Superior Court of Fulton County

[Title omitted]

AFFIDAVIT OF POVERTY—Filed February 16, 1954

Personally appeared before the undersigned Aubry Williams, said defendant, who on oath says that he is unable from his poverty to pay the costs, and that he is advised by counsel that he had good cause for writ of error. Defendant makes this affidavit that supersedeas may issue.

AUBRY WILLIAMS,
Defendant.

Duly sworn to. Jurat omitted in printing.

[File endorsement omitted.]

39 Clerk's Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

40 In Supreme Court of Georgia

OPINION—May 19, 1954

By the Court:

There is no error in the judgment of the court below dismissing the extraordinary motion for new trial.

The plaintiff in error was tried and convicted of murder, without a recommendation of mercy, in the Superior Court of Fulton County on March 10, 1953. A motion for new trial was filed and duly overruled. That judgment was affirmed by this court. See Williams v. State, 210 Ga. 207.

On December 1, 1953, the plaintiff in error filed his extraordinary motion for new trial. This motion was set for hearing and duly continued until January 18, 1954. When the motion came on for a hearing, it was dismissed on motion of the solicitor-general. To this judgment the plaintiff in error excepted and assigns this judgment as error.

The extraordinary motion for new trial contains two grounds both complaining that the defendant had been denied certain specified constitutional rights guaranteed him under stated provisions of the Constitution of the United States. Ground two has been expressly abandoned, and will not be considered. Ground one contends that, upon the trial of the defendant for murder in the Superior Court of Fulton County, he was denied equal protection of the laws in violation of sec. 1 of the Fourteenth Amendment to the Constitution of the United States (Code § 1-815). This ground is long and sets out the process of selecting persons to serve as jury commissioners and persons to serve as jurors, and the empaneling of said jurors to serve in specific cases. The substance of the contention, however, that
41 the defendant was denied equal protection of the laws was that, in the selection, drawing, summoning, organizing, empaneling, and challenging of the jury sworn to try him, he was discriminated against on account of his color.

Many methods and instances of discrimination against the defendant are related in ground one of the extraordinary motion. However, it is urged in this court that the defendant is entitled to a new trial because of the fact that the names of white traverse jurors were placed on white paper and that the names of colored traverse jurors were placed on yellow paper. It is urged that this is discriminatory, and that this practice made it possible to keep the number of Negroes summoned for jury service within the number of peremptory challenges allowed the State and thus enabled the State to keep Negroes from serving on the jury.

It appears from the record that four Negroes were on the panel of 48 put upon the defendant. Three of these were excused for cause. The fourth was called for service by the clerk and was peremptorily challenged by the State, leaving no Negroes on the jury.

The other grounds of the motion need not be set out here, since they are not argued in this court. However, the decision here made will be decisive of all questions in the case, since all relate to the legality of the selection, drawing, summoning, organizing, and empaneling of the jury put upon the defendant.

42 WYATT, *Presiding Justice:* 1. The defendant is here attempting by extraordinary motion for new trial to challenge the legality of the jury put upon him in the instant case. He relies entirely upon the case of Avery v. State of Georgia, 345 U. S. 559

(73 S. Ct. 891), contending that this case is controlling in the instant case. We do not agree with this conclusion. In Avery v. State of Georgia, supra, the defendant, upon being arraigned for trial in Fulton County, filed a written challenge to the array of traverse jurors put upon him for reasons set out, among them that the names of white jurors were put upon white slips of paper and that the names of colored jurors were put upon yellow paper. See Avery v. State of Georgia, supra, and Avery v. State, 209 Ga. 116. In the instant case, no challenge to the array of traverse jurors was filed, and no question as to the legality of the jury was raised until after the denial of a motion for new trial had been affirmed by this court. See Williams v. State, 210 Ga. 207.

It is settled law in this State that, when a panel of jurors is put upon the prisoner, he should challenge the array for any cause which would go to show that it was not fairly and properly put upon him, and that if he fails to do so, the objection is waived and can not thereafter be made a ground of a motion for new trial. See Lumpkin v. State, 152 Ga. 229; Cornelius v. State, 193 Ga. 25; Cumming v. State, 155 Ga. 346; Moon v. State, 68 Ga. 687; and Williams v. State, 31 Ga. App. 17. In the instant case, the defendant made no objection to the jury when the panel was put upon him, and made no objection until he filed this extraordinary motion for new trial after a new trial had been denied and that judgment affirmed by this court. See Williams v. State, supra.

It follows, therefore, that the judgment of the court below dis-
43 missing the extraordinary motion for new trial was not error.

The defendant and his attorney state that they did not know of the facts set out in grounds one and two of the motion for new trial, and "that the same could not have been discovered by him in the exercise of ordinary diligence." This is not sufficient to excuse the defendant from the necessity of presenting his written challenge to the array of traverse jurors when the panel was put upon him. See, in this connection, Lumpkin v. State, supra; Cornelius v. State, supra; Redding v. State, 183 Ga. 704; Edge v. State, 200 Ga. 257. It follows, under the decisions of this court above cited, it was not error to dismiss the extraordinary motion for new trial.

2. There is a further reason why the motion in the instant case is not sufficient as an extraordinary motion for new trial. The affidavit of the defendant states in part: "The defendant did not at the time of his trial . . . have any information concerning the selection, drawing, organizing, and empaneling of the jury panel put upon him on his trial, but assumed that the jury was a legal jury." The affidavit of the attorney representing the defendant states in part: "Deponent further says that he did not know of the facts set out in the first and second grounds of the extra-

ordinary motion for new trial . . . before the trial and before the verdict in said case, and that the same could not have been discovered by him in the exercise of ordinary diligence." It has been held by this court that affidavits such as are attached to this motion and set out above are merely opinion, without sufficient facts being shown by which the court could judge whether due diligence had been exercised, and are not sufficient to support an extraordinary motion for new trial. Edge v. State, supra; Redding v. State, supra.

Furthermore, the facts and circumstances contradict the statements made in the affidavits. When the instant case came on for trial in Fulton Superior Court on March 10, 1953, the case
44 of Avery v. State, had been tried in the same county, and that case had been affirmed by this court on April 14, 1952, and was pending in the United States Supreme Court. See Avery v. State, 209 Ga. 116. The opinion of this court affirming the lower court in the Avery case sets out fully the methods and practices employed in the selection and empaneling of juries in Fulton County, including the practice of putting the names of white jurors on white slips of paper and the names of colored jurors on yellow slips of paper. Due diligence would certainly have required the defendant and his attorney to make themselves familiar with the opinions of this court on the question now raised. It follows that, for this reason, the motion for new trial was not sufficient as an extraordinary motion for new trial.

3. Defendant in his motion sets forth a practice which has been condemned by this court and the Supreme Court of the United States. However, any question to be considered by this court must be raised at the time and in the manner required under the rules of law and practice and procedure in effect in this State. We can not simply overlook the rules made for the purpose of providing a fair and orderly procedure in the conduct of trials and other legal processes in this State and permit the defendant to stand negligently or purposefully by, taking his chances of an acquittal, and then, upon his conviction, and upon the denial of a new trial which is affirmed by this court, be heard to say that the panel of jurors put upon him was not fairly and properly selected and empaneled. When this defendant failed to raise this question when the panel was put upon him, he waived the question once and for all.

It follows, there was no error in dismissing the extraordinary motion for new trial.

Judgment affirmed. All the Justices concur.

45-48 In Supreme Court of Georgia

AUBREY WILLIAMS

v.

THE STATE

JUDGMENT—May 10, 1954

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

49-52 In Supreme Court of Georgia

ORDER DENYING REHEARING—May 31, 1954

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

53 Supreme Court of the United States

October Term, 1954

No. 110 Misc.

[Title omitted]

On petition for writ of Certiorari to the Supreme Court of the State of Georgia.

ORDER ALLOWING CERTIORARI—October 18, 1954

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to the appellate docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 412.

AUBRY WILLIAMS,
Petitioner,

vs.

STATE OF GEORGIA.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF OF PETITIONER ON THE MERITS.

CARTER GOODE,
Counsel for Petitioner.

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84 Peachtree Street, N. W.,
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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

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AUBRY WILLIAMS,
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vs.

STATE OF GEORGIA.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF OF PETITIONER ON THE MERITS.

I.

OPINION BELOW.

The opinion of the Supreme Court of Georgia affirming the overruling of petitioner's extraordinary motion for a new trial here under attack is reported in 210 Ga. 665, 82 S. E. 2d 217.

II.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner under 28 U. S. C. 1257 (3), petitioner contending that the Court below has decided a federal question of substance contrary to the ruling of this Court in Avery v. Georgia, 345 U. S. 599, 97 L. Ed. 1244, 73 S. Ct. 891. The judgment of the Supreme Court of Georgia is dated May 10, 1954, and a motion for a rehearing was denied by order dated and entered May 31, 1954 (R. 23). Petition for certiorari was filed July 9, 1954.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

(i) Constitution of the United States, U. S. C. A. Const. Art. XIV, Sec. 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

(ii) Code of Georgia, 1933, Sec. 59-805:

> "Every person indicted for a crime or offense which may subject him to death or imprisonment in the penitentiary for not less than four years may peremptorily challenge 20 of the jurors impaneled to try him, and every person indicted for an offense which may subject him to imprisonment in the penitentiary for any time less than four years may peremptorily challenge 12 of the jurors impaneled to try him; and the State shall be allowed one-half the number of peremptory challenges allowed to the prisoner."

IV.

QUESTIONS PRESENTED FOR REVIEW.

Whether a trial court practice of placing names of white jurors on white paper, and names of negro jurors on yellow paper, in the traverse jury box of such court discriminates in violation of Constitution of the United States, Art. XIV, Sec. 1, against a negro defendant on

trial for the homicide of a white man, by permitting control of the number of negro jurors, selected, drawn, summoned, organized, and impaneled for traverse jury duty, the State having by statute the right to challenge peremptorily ten jurors on such trial, and actually challenging the only qualified negro juror.

V.

STATEMENT OF THE CASE.

Petitioner was tried under an indictment for the offense of murder in the Superior Court of Fulton County, Georgia, during the March Term, 1953, and was found guilty of the offense of murder on March 10, 1953. The verdict of the trial jury made a sentence of death by electrocution mandatory. The Supreme Court of Georgia in Case No. 18,348, decided October 14, 1953 (Williams v. State, 210 Ga. 207, 78 S. E. 2d 521), affirmed the judgment of the trial court overruling his motion for a new trial complaining of errors in the course of the trial. During the November Term, 1953, of Fulton Superior Court, on December 1, 1953, petitioner presented in the trial court a written motion for a new trial upon grounds not previously presented complaining that on his trial he had been denied the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. In the extraordinary motion for a new trial, a pleading, petitioner alleged that he, a Negro, on trial for the murder of a white man, was discriminated against and denied the equal protection of the laws by reason of the circumstances of the selection, drawing, summoning, organizing, impaneling, and challenging of the jury sworn to try him (R. 5). He alleged that the traverse jury box from which were drawn the names of the jurors put upon him on his trial contained white tickets bearing the names of white jurors, and yellow

tickets bearing the names of Negro jurors. On February 18, 1953, one of the Judges of Fulton Superior Court drew from one of the compartments of the traverse jury box some number of tickets in excess of 120, bearing the names of jurors, to serve as petit or traverse jurors for the trial of civil and criminal cases in Fulton Superior Court during the week of March 9, 1953 (R. 4, 5). The tickets were handed by the Judge to a deputy sheriff, who handed them to a deputy clerk for listing, and, following listing, returned them to the Judge, who placed them in another compartment of the jury box (R. 5). All handling and listing occurred in the presence of the Judge, who did not, however, personally verify the listing of names by the deputy clerk, nor the total number of names on the list by a count of the tickets. After the summoning of the jurors whose names appeared on the list, and after some number were excused, there were organized ten panels of twelve jurors for the trial of civil and criminal cases in Fulton Superior Court during the week of March 9, 1953, or a total of 120 jurors. Four of these jurors were Negroes. Panels 6, 7, 8, 9 and 10, each of twelve jurors, were assigned to serve in the criminal division of the court, all four of the negro jurors being included in these panels. No negro jurors were included in the panels assigned to serve in the civil division. A panel of 48 jurors, from those assigned to serve in the criminal division, was put upon petitioner upon his trial, and thirteen of these jurors were excused for cause. Three of the four Negro jurors were among those excused for cause. The name of the one Negro juror not disqualified appeared fourth upon the list of jurors as called over by the clerk for challenge, and upon the calling of his name by the clerk, and before being put upon the defendant, the prosecution exercised its first peremptory challenge and excused the juror, he being the first juror challenged by either side. This left no negro juror qualified to try petitioner among the jurors impaneled for the week of March 9, 1953.

By reason of the use of different colors for tickets in the traverse jury box, bearing the names of white and negro jurors, respectively, the operation of the mathematical laws of chance may be defeated, and it is made possible to keep the number of Negro jurors summoned for jury duty within the six peremptory challenges allowed the prosecution in any felony case, and well within the ten such allowed upon the trial of a capital felony, so that the State's counsel may in every case where a Negro is on trial absolutely assure that no member of his race will be sworn as a juror (R. 4).

The use of peremptory challenges by State's counsel as a means of preventing jury service by Negroes is well known to all solicitors-general, and in a reported decision of the Supreme Court of Georgia (Watkins v. State, 199 Ga. 81), reference is made to statements in public speeches by a solicitor-general that he used this means of preventing Negro jurors from serving in his court. With control of the number of negroes selected, drawn, summoned, organized or impaneled for jury service, peremptory challenges could effectively prevent a Negro juror from being sworn to try a case.

The trial court ordered the motion filed, and at a hearing subsequently had, without evidence being adduced, sustained a motion to dismiss by counsel for the State, on the ground that the motion failed to make a case for the granting of a new trial (R. 16).

The judgment of the trial court dismissing the extraordinary motion for a new trial was assigned as error as contrary to law (R. 16, 17), in petitioner's bill of exceptions timely filed, and these facts were relied upon in the Supreme Court of Georgia, where the exceptions were heard upon writ of error.

VI.

SUMMARY OF ARGUMENT.

The present case is controlled by the ruling of the Court in Avery v. Georgia, 345 U. S. 599, 97 L. Ed. 1244, 73 S. Ct. 891, involving the identical jury selection process complained of here.

VII.

ARGUMENT.

Practices adopted in the selection, drawing, summoning, organizing and impaneling of jurors for the trial of persons accused of crime, in State Courts, and particularly such practices as they affect the rights of Negroes accused of crime to equal protection of the laws, have been under scrutiny by this court. The very practice now complained of was condemned by this court in **Avery v. State of Georgia,** 345 U. S. 559, 97 L. Ed. 1244, 73 S. Ct. 891.

Here there is for consideration whether the ruling in the **Avery** case should control under a state of facts plainly illustrating how the actual serving of Negroes on juries sworn to try members of their race can be prevented through the exercise of peremptory challenges by the prosecution, coupled with control of the number of such jurors selected, drawn, summoned, organized, or impaneled.

Although Negro jurors were selected, drawn, summoned, organized, and impaneled, not one was sworn to try the case. Not one was challenged by the accused, nor did he have an opportunity to challenge a Negro juror. The circumstances that only four Negro jurors were included among the 120 organized for the week of March 9, 1953; that all four were included in the panels assigned to the criminal division; and that at the first opportunity the prosecution challenged the sole qualified Negro juror among 107 jurors then impaneled, may have been purely coincidental. On the other hand, by the device of white and yellow tickets, the same result, that no Negro sat on the jury, could have been achieved by design, with the same facts appearing in the record. No Negro sat on the jury. The fact that names of jurors were on tickets en-

abling white and Negro talesmen to be distinguished, each from the other, made discrimination possible.

The decision of the court below is believed to be erroneous, and not in accord with the decision of this court in **Avery v. State of Georgia**, supra. In the **Avery** case, this court condemned the practice of issuing white and yellow tickets for the names of white and Negro jurors in the Fulton County traverse jury box. In the **Avery** case, there were no Negroes on the jury put upon the accused. The questions relating to the legality of the array were raised by a written challenge to the array of traverse jurors, timely filed and insisted upon. Here a challenge to the array would have been premature and speculative, and only when counsel for the State, having the first jury challenge, peremptorily challenged the one remaining Negro juror was the end of the discriminatory process reached.

The court below stopped at a procedural stage short of the peremptory challenge of the sole remaining Negro juror in its consideration of the case, and held that the accused's last chance to make the objection sought to be made was when the jury was put upon him, by a challenge to the array, and that having failed thus to chalienge the array, the objection came too late. Having advanced one procedural reason for upholding a verdict by a jury admitted tacitly to have been illegal, the court below went outside the record for other procedural reasons, and avoided giving application to the ruling of this court in the **Avery** case. By this course, a decision on the constitutional question which must have been favorable to petitioner was avoided, and petitioner's trial in effect held to have been legal. The decision below is believed to be erroneous by reason of the narrow view of the case taken by the court.

VIII.

CONCLUSION.

Since petitioner was not afforded the opportunity to support his extraordinary motion for a new trial by proof, but the same was dismissed, petitioner respectfully prays that the decision below be reversed, with direction that the extraordinary motion be heard and if supported by proof, a new trial be granted petitioner.

Respectfully submitted,

CARTER GOODE,
Counsel for Petitioner.

605 Georgia Savings Bank Building,
84 Peachtree Street, N. W.,
Atlanta, Georgia.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1954

No. 412

AUBRY WILLIAMS,
Petitioner.

THE STATE OF GEORGIA,
Respondent.

On Writ of Certiorari to
The Supreme Court of Georgia

BRIEF OF RESPONDENT

EUGENE COOK,
Attorney General of Georgia

ROBERT H. HALL,
Assistant Attorney General

E. FREEMAN LEVERETT
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1954

No. 412

AUBRY WILLIAMS,
Petitioner.

vs.

THE STATE OF GEORGIA,
Respondent.

On Writ of Certiorari to
The Supreme Court of Georgia

I.

OPINIONS BELOW

The judgment of the Fulton Superior Court dismissing the petitioner's extraordinary motion for new trial is unreported, but is found in the Transcript of Record, page 16. The opinion of the Supreme Court of Georgia, affirming that judgment, is reported in 210 Ga. 665, 82 S.E. 2d 217, and found in the Transcript of Record, page 19, et seq. The opinion of the Supreme Court of Georgia affirming petitioner's conviction on appeal (prior to filing of the extraordinary motion for new trial) and which is not drawn in question here, is reported in 210 Ga. 207, 78 S.E. 2d 521.

II.

JURISDICTION

The jurisdiction of this Court is invoked by peti-

tioner under 28 U.S.C., Section 1257(3). Respondent respectfully denies the jurisdiction of this Court and contends that neither the Supreme Court of Georgia, nor the Superior Court of Fulton County, the trial court below, has at any stage of the proceeding decided a federal question as contended by petitioner.

III.

STATUTES INVOLVED

28 U.S.C., Section 1257(3):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Although petitioner states in his brief, page 2, that the Georgia Code, Section 59-805, relating to the number of peremptory juror challenges allowed a defendant and the State, is involved, neither in the extraordinary motion for new trial, nor in his brief filed in this court, does petitioner attack this statute as being invalid.

IV.

STATEMENT

On March 10, 1953, petitioner was convicted in Fulton Superior Court of the offense of murder, and sen-

tenced to death. On appeal, the Supreme Court of Georgia affirmed the conviction as against several assignments of error, none of which are involved in this proceeding. See *Williams vs. State*, 210 Ga. 207, 78 S.E. 2d 521. The decision of the Supreme Court was rendered on October 14, 1953, and almost two months later, to wit, on December 1, 1953, petitioner filed in Fulton Superior Court an extraordinary motion for new trial, based on two grounds (R. 1). The second ground of this motion was abandoned (Opinion of the Supreme Court of Georgia, R. 20), and although the first ground (R. 1-6) is rather sweeping in its language, the issue has been narrowed down by the petition for certiorari to the proposition that the combination of two factual circumstances has operated to deny petitioner the equal protection of the laws, to wit: (1) The use by the Fulton jury commissioners of different colored slips of paper for the jury tickets of Negro and white jurors enabled the judge and other court officials drawing the names of prospective jurors from the jury box to deliberately discriminate against Negro jurors and thereby so limit the number of Negro jurors drawn for any panel to such a number as would (2) permit the Solicitor General to effectively prohibit, by the use of the peremptory challenges granted him by the statute,[1] any Negro from ever serving on a jury. (R. 4) Petitioner's motion reasoned that had members of his race been permitted to serve on the jury trying him, they might have given more regard to his statements denying implication in the crime, and in the event of conviction, might have voted to recommend mercy, in view of their understanding of "movant's heredity and environment, and of motivations among

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[1] Georgia Code, Section 59-805. In capital cases, the accused is entitled to twenty peremptory challenges, and the State to one-half the number granted the accused.

members of their race." (R. 5-6) [2]

Of the forty-eight jurors impaneled to try petitioner, four were Negroes, three of whom were excused for cause. The remaining Negro juror was challenged peremptorily by the State. (R. 5)

Upon hearing, the Court refused to consider the motion, and ordered its dismissal, the judgment declaring that the "grounds of the motion do not make out such a case as would authorize the court to hear and consider same as an extraordinary motion . . ." (R. 16) On appeal, the Supreme Court of Georgia affirmed the dismissal on two separate grounds, viz: (1) Petitioner waived any rights he may have had by failing to challenge the array of jurors put upon him, irrespective of whether or not he was aware, prior to the trial, of the practice of the Fulton jury commissioners in using different colored slips for white and colored jurors;[3] (2) The extraordinary motion for new trial was defective under Georgia practice for failure of the accompanying affidavits as to diligence of petitioner and his counsel to follow the form required by law. (R. 20-21)

Concluding, the Georgia Supreme Court declared,

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[2] Since nowhere in the motion or the petition does petitioner claim that the white jurors trying him were prejudiced against him in any way, the only reasonable construction of the above complaint is that petitioner believed that had colored jurors been permitted to serve, they would have been prejudiced in his favor, which of course is exactly what we believe the peremptory challenge was designed to prevent.

[3] The use of different colored jury slips by the Fulton Superior Court was declared illegal by this Court in *Avery vs. Georgia*, 345 U.S. 599, 97 L. Ed. 1244, 73 S. Ct. 891. The Avery case, which gained widespread notoriety from the moment of its transfer to Fulton County under a change of venue order, was tried in Fulton Superior Court on September 20, 1951, almost two years prior to the date of petitioner's trial on March 10, 1953. The allegations in the Avery case as to the alleged discrimination arising from use of the different colored jury slips, which were considered at this time by the court in passing upon the challenge to the array, were a popular topic of conversation in Fulton County. The decision of the Supreme Court of Georgia, detailing at length the undisputed facts as to the use of the jury slips, was rendered on April 14, 1952 (209 Ga. 116, 70 S.E. 2d 716), almost a year prior to petitioner's

> "Defendant in his motion sets forth a practice which has been condemned by this court and the Supreme Court of the United States. However, any question to be considered by this court must be raised at the time and in the manner required under the rules of law and practice and procedure in effect in this State. We can not simply overlook the rules made for the purpose of providing a fair and orderly procedure in the conduct of trials and other legal processes in this State and permit the defendant to stand negligently or purposefully by, taking his chances of an acquittal, and then, upon his conviction, and upon the denial of a new trial which is affirmed by this Court, be heard to say that the panel of jurors put upon him was not fairly and properly selected and impaneled. When this defendant failed to raise this question when the panel was put upon him, he waived the question once and for all."

It is highly pertinent to note that at no time prior to trial, during trial, or after trial on appeal, did petitioner raise or attempt to raise in any fashion, any objections to the jury impaneled to try him, nor any

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trial on March 10, 1953. The decision of the Georgia Supreme Court in the Avery case was widely publicized by the two Atlanta dailies, the *Atlanta Constitution*, having a circulation of 183,300, and the *Atlanta Journal*, having a circulation of 257,676, and the two having a combined Sunday circulation of 489,622. The two newspaper articles reporting this decision are reproduced in the Appendix, page 20. On May 25, 1953, the decision of this Court reversing the Avery case was announced. Seldom has a criminal case in Fulton County attracted so much publicity, led by a front page article in the *Atlanta Constitution*. See Appendix, page 21. Therefore, although the decision of this Court in the Avery case was rendered approximately two months after petitioner's trial, petitioner nevertheless failed to even raise the questions urged here in the amendment to his original motion for new trial, filed on June 29, 1953, over one month after the Avery reversal. As was pointed out in our Brief in Opposition, petitioner's complaint ultimately is that he did not know the law, since had he known the law, he of necessity would have known the facts, in that the only case dealing with this point of law is the Avery case, which involved jury practices in the same county complained of here, to wit, Fulton County, Georgia.

objection to the peremptorily challenging by the State of the one lone Negro juror remaining on the panel. Petitioner felt confident to ignore these questions and take the chances of a jury verdict. That result having been unfavorable to him, he now seeks to assert these defenses through a collateral attack by way of an extraordinary motion for new trial.

By way of information, it should be noted that the Fulton Superior Court has in good faith carried into effect the mandate of this court's opinion in the Avery case, for immediately thereafter, a complete revision of the jury boxes was begun and finally completed and delivered to the Clerk on April 12, 1954. As soon as practicable thereafter, to wit, in early May next following, the new boxes were put into use. Petitioner's case was tried on March 10, 1953, over two months prior to this court's reversal of the Avery case on May 25, 1953.

V.

SUMMARY OF POSITION

This brief will be confined to establishing the following propositions of law:

1. Since the trial court below dismissed (as distinguished from overruling on the merits) petitioner's extraordinary motion for new trial for failure to comply with State procedure, which was affirmed by the Supreme Court of Georgia, there has been no decision by a state court of a federal question, and this court is therefore without jurisdiction to decide the issues sought to be raised by the petition for certiorari, and the writ should be dismissed as improvidently granted.

2. At no stage of the proceeding below, or in this

court, has petitioner asserted a new claim of denial of due process for want of sufficient state corrective process, and therefore, no federal question in this respect is ripe for determination.

The principles of law discussed in the Brief in Opposition will not be re-argued here, and accordingly, the Court is respectfully referred thereto for consideration. By way of summary, it is there maintained that:

(1) Practices of jury commissioners resulting in exclusion of certain classes of jurors from the panel were denominated *propter defectum* in *Lumpkin vs. State*, 152 Ga. 229(7), 109 S.E. 664, and in *Mitchell vs. State*, 69 Ga. App. 771 (4), 26 S.E. 2d 663, it was further held that matters *propter defectum* could not be raised after verdict, even where such matters were unknown to the complainant beforehand, but must be raised by challenge to the array.

(2) Under Georgia practice, an extraordinary motion for new trial does not lie in any case where the complainant either knew or should have known by the exercise of proper diligence, of the facts in time to have incorporated same into the amendment to his original motion for new trial. In footnote 3, supra, it was shown that not only was the Avery case tried and affirmed by the Georgia Supreme Court prior to petitioner's trial, but that the decision of this Court was rendered over one month prior to the filing of petitioner's amended motion. As to the widespread publicity given the Avery case, see the newspaper articles reproduced in the Appendix herein.

(3) Under Georgia practice, extraordinary motions for new trial, not being a part of the direct

review process, are not favored (*Wallace vs. State*, 205 Ga. 751, 55 S.E. 2d 145), and where based on newly discovered evidence, will not be entertained unless a different result would likely have ensued had the facts been known. *Parks vs. State*, 204 Ga. 41, 48 S.E. 2d 837. Applied to the instant case, this would have required petitioner to show either (a) that the white jurors trying him were in fact prejudiced *against* him because of his color, or (b) that had Negroes served on the jury, they would have been prejudiced *for* him because of his color. Petitioner neither alleged nor proved the first proposition and although he in substance alleged the second (R. 9), the short answer thereto is that he is no more entitled to have a jury prejudiced in his favor than he is to have one prejudiced against him.

(4) The affidavits of diligence, accompanying petitioner's motion were defective, and under the opinion of the court below construing the Georgia cases, invalidated the motion. (R. 21-22) While at first impression, this may seem a rather technical objection, when viewed in the perspective of the circumstances regarding the chronological relationship of the various stages of the Avery case and petitioner's case, it is obvious that petitioner's counsel could ill-afford to be too specific in his allegations of diligence, for fear of perjuring himself.

(5) The Avery case, the only authority upon which petitioner relies is readily distinguishable, for there the objections to the jury were properly raised by challenge to the array, filed prior to trial, while here, petitioner not only failed to raise these questions before or during trial, but even

failed to raise them on appeal. See *Wilcoxon vs. Aldredge*, 192 Ga. 634, 15 S.E. 2d 873, cert. den. 317 U.S. 626; *Brown vs. Allen*, 344 U.S. 443, 480, 97 L. Ed. 469, 501, 73 S. Ct. 397, 419, reh. den. 345 U.S. 946.

(6) Petitioner's waiver of his constitutional rights was not affected by action of the state in peremptorily challenging the only Negro juror on the panel not previously disqualified for cause. Numerous authorities from different jurisdictions were cited in support of this principle. Other authorities since brought to our attention are *Morris vs. State*, (1952) 251 S.W. 2d 731(4), cert. den. 345 U.S. 951; *Wasy vs. State*, Ind. Sup. Ct., January 5, 1955 (23 Law Week 2323); 2 Vand. L.R. 111; 48 Col. L.R. 953; 61 Harv. L.R. 1455. With regard to use of the peremptory challenge, it is just as reasonable for the prosecution to conclude that a Negro juror would be prejudiced in favor of an accused of his race as it would be for the petitioner to maintain that the white jurors were prejudiced against him.

(7) Petitioner's contention was in effect that he was entitled as a matter of right to have members of his own race serve on the jury, a contention which has been many times rejected by this Court. *Gibson vs. Mississippi*, 162 U.S. 580; *Akins vs. Texas*, 325 U.S. 398.

VI.

ARGUMENT AND CITATION OF AUTHORITIES

The Writ Should Be Dismissed As Improvidently Granted, The Court Below Having Refused On Procedural Grounds To Pass Upon Petitioner's Constitutional Question.

The judgment of the Fulton Superior Court rendered on the hearing of petitioner's extraordinary motion for new trial, reads as follows:

> "The above and foregoing extraordinary motion for new trial coming on regularly for hearing, and upon motion of the Solicitor General, the same is hereby dismissed for the reason that the grounds of the motion did not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion, that such motion is not [sic] good as an extraordinary motion and cannot be equally entertained as such.
>
> /s/ E. E. Andrews
>
> Judge S. C. A. C."
>
> (R. 16)

It is obvious from the above language that the court never considered the petitioner's motion on its merits, but instead dismissed it on the ground that the questions sought to be raised therein could not properly be entertained in such a motion. Had the court actually undertaken to determine whether or not petitioner's constitutional questions were meritorious and found against them, the motion would have been *overruled* on the merits, rather than *dismissed* on procedural grounds.

So being, the case is controlled by the decision of this Court in *Hedgebeth vs. North Carolina* (1948), 334 U.S. 806, 92 L. Ed. 1739, 68 S. Ct. 1185. In that case the petitioner sued out a writ of habeas corpus alleging that he had been denied benefit of counsel in violation of due process guaranteed by the Fourteenth Amendment. The Supreme Court of North Carolina dismissed the appeal, assigning as a reason the failure

of petitioner to bring up sufficient portions of the record.

This Court granted certiorari, but after argument, dismissed the writ as having been improvidently granted, the *per curiam* opinion declaring,

> "In reviewing a judgment of a State court, we are bound by the record on which that judgment was based. Since the North Carolina Supreme Court went on the ground that it did not have the full record before it, we are constrained to dismiss this writ because the judgment below can rest on a non-federal ground. Petitioner's rights under the Federal Constitution must be pursued according to the procedural requirements of North Carolina or, in default of relief by available North Carolina proceedings, by a new claim of denial of due process for want of such relief. *Foster vs. Illinois*, 332 U.S. 134, 139, 91 L. Ed. 1955, 1959, 67 S. Ct. 1716."

In any case where it appears that the decision below was not based on a federal ground, the writ will be dismissed as improvidently granted. *Phyle vs. Duffy*, 334 U.S. 431, 92 L. Ed. 1494, 68 S. Ct. 1131, reh. den. 334 U.S. 862; *Missouri Pacific Railroad Co. vs. Hanna*, 266 U.S. 184, 69 L. Ed. 235, 45 S. Ct. 36; *Hammerstein vs. Superior Court*, 341 U.S. 491, 95 L. Ed. 1135, 71 S. Ct. 820, reh. den. 342 U.S. 843; *Bankers Life and Casualty Co. vs. Holland*, 346 U.S. 379, 98 L. Ed. 106, 74 S. Ct. 145 (dissent). The same principle applies to writs of error. *O'Neil vs. Vermont*, 144 U.S. 323, 36 L. Ed. 450, 12 S. Ct. 693; *Tripp vs. Santa Rosa Street Railroad Co. et al*, 144 U.S. 126, 36 L. Ed. 371, 12 S. Ct. 655; *Wood vs. Brady*, 150 U.S. 18, 37 L. Ed. 981, 14 S. Ct. 6; *Herndon vs. Georgia*, 295 U.S. 441, 79 L. Ed.

1530, 55 S. Ct. 794. "Where the highest court of the State delivers no opinion, and it appears that the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment." *Stembridge vs. Georgia*, 343 U.S. 541, 547, 96 L. Ed. 1130, 1134, 72 S. Ct. 834; *Buck vs. California*, 343 U.S. 99, 96 L. Ed. 775, 72 S. Ct. 502; *Dixon vs. Duffy*, 344 U.S. 143, 97 L. Ed. 153, 73 S. Ct. 193.

Neither is the argument of judicial "wasted effort" particularly appealing to this court. In *Layne vs. Western Well Works*, 261 U.S. 387, 393, 67 L. Ed. 712, 714, 43 S. Ct. 422, Mr. Chief Justice Taft declared:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

Where the decision is based on State grounds, the mere fact that the State court erred in construing or applying its laws does not confer jurisdiction (*Gibson vs. Mississippi*, 162 U.S. 565, 591, 40 L. Ed. 1075, 1082, 16 S. Ct. 904), as mere error alone does not constitute a denial of due process. *Howard vs. Kentucky*, 200 U.S. 164, 50 L. Ed. 421, 26 S. Ct. 189; *Gryger vs. Burke*, 334 U.S. 728, 92 L. Ed. 1683, 68 S. Ct. 1256; *Stein vs. New York*, 346 U.S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077.

A decision based on questions of State practice presents no federal question (*Thorington vs. City Council of Montgomery*, 147 U.S. 490, 37 L. Ed. 252, 13 S. Ct. 394), even where the cause of action is based on a federal statute. *Central Vermont Railway Co. vs. White*, 238 U.S. 507, 59 L. Ed. 1433, 35 S. Ct. 865.

More specifically, this Court has many times recognized that constitutional questions may be waived by failure to insist thereon in the trial court. In *Yakus vs. United States*, 321 U.S. 414, 444, 88 L. Ed. 834, 859, 64 S. Ct. 660, it was stated,

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil vs. Vermont, 144 U.S. 323, 331, 36 L. Ed. 450, 455, 12 S. Ct. 693; Barbour vs. Georgia, 249 U.S. 454, 460, 63 L. Ed. 704, 707, 39 S. Ct. 316; Whitney vs. California, 274 U.S. 357, 360, 362, 380, 71 L. Ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. vs. Watson, 287 U.S. 86, 77 L. Ed. 180, 53 S. Ct. 32, 86 A.L.R. 174. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in Whitney vs. California, supra (274 U.S. 380, 71 L. Ed. 1107, 47 S. Ct. 641), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare Woolsey vs. Best, 299 U.S. 1,

81 L. Ed. 3, 57 S. Ct. 2, with Ex parte Siebold, 100 U.S. 371, 25 L. Ed. 717."

See also, *Charleston Federal Savings and Loan Association vs. Alderson*, 324 U.S. 182, 89 L. Ed. 857, 65 S. Ct. 624, reh. den. 324 U.S. 888; *Jennings vs. Illinois*, 342 U.S. 104, 109, 96 L. Ed. 119, 124, 72 S. Ct. 123.

As a corollary of the above rule, is the proposition that oversight of one's chosen counsel does not violate due process. In *Market Street Railway Co. vs. Railroad Commission of California*, 324 U.S. 548, 89 L. Ed. 1171, 65 S. Ct. 770, reh. den. 324 U.S. 890, this court declared,

> "A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal, but it is not grounds for our interference as a denial of constitutional rights."

Or better still, as was said in *United States ex rel Smith vs. Baldi*, 344 U.S. 561, 568, 97 L. Ed. 549, 556, 73 S. Ct. 391,

> "A claim of denial of due process can hardly be predicted upon the failure of a defense move."

Even where a federal question is passed upon by the trial court, but its judgment reversed by the state appellate court on grounds that the question was improperly considered, there is no federal question for consideration by this court (*Louisville and Nashville Railroad Co. vs. Woodford*, 234 U.S. 46, 58 L. Ed. 1202, 34 S. Ct. 739), while on the other hand, if the highest state court itself considers the federal question although tardily raised, this court may review such decision. *Shapiro vs. Wilgus*, 287 U.S. 348, 77 L. Ed. 355,

53 S. Ct. 145; *Charleston Federal Savings and Loan Association vs. Alderson*, supra; *Louisville and Nashville Railroad Co. vs. Higdon*, 234 U.S. 592, 58 L. Ed. 1484, 34 S. Ct. 948.

Having thus established that constitutional questions may be waived [4] for failure to raise at the appropriate time and in the appropriate manner, it only remains to determine which law must be looked to in order to determine whether or not such questions were properly raised. To do so, we need hardly travel afar: The decisions of this court admit of no doubt that the manner and time of raising questions under the Constitution of the United States depend upon the requirements of state law. *Layton vs. Missouri*, 187 U.S. 356, 47 L. Ed. 214, 23 S. Ct. 137; *Jacobi vs. Alabama*, 187 U.S. 133, 47 L. Ed. 106, 23 S. Ct. 48; *Baldwin vs. Kansas*, 129 U.S. 52, 32 L. Ed. 640, 9 S. Ct. 193; *Young vs. Ragen*, 337 U.S. 235, 93 L. Ed. 1333, 69 S. Ct. 1072; *Hardware Dealers Insurance Co. vs. Glidden Co.*, 284 U.S. 151, 158, 76 L. Ed. 214, 219, 52 S. Ct. 69; *Grand Rapids and Indiana Railroad Co. vs. Butler*, 159 U.S. 87, 40 L. Ed. 85, 15 S. Ct. 991; *Barbour vs. Georgia*, 249 U.S. 454, 63 L. Ed. 704, 39 S. Ct. 316; *Nevada-California-Oregon Railway Co. vs. Burris*, 244 U.S. 103, 61 L. Ed. 1019, 37 S. Ct. 576.

In *Edleman vs. California*, 344 U.S. 357, 358, 97 L. Ed. 387, 391, 73 S. Ct. 293, this court, in refusing to review the constitutionality of a California vagrancy statute on the ground that petitioner had failed to raise the question during trial but had merely attempted to assert this defense for the first time on appeal, declared,

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[4] In *Ex Parte Spies*, 123 U.S. 131, 181, 31 L. Ed. 80, 91, 8 S. Ct. 21, it was said that the question of raising constitutional questions at the proper time and in the proper mode was not a question of "waiver" but of "claim."

"It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. Hulbert vs. Chicago, 202 U.S. 275, 50 L. Ed. 1026, 26 S. Ct. 617 (1906); Mutual Life Ins. Co. vs. McGrew, 188 U.S. 291, 308, 47 L. Ed. 480, 484, 23 S. Ct. 375, 63 L.R.A. 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below."

More relevant to the instant case however, is the language found in *Hartford Life Insurance Co. vs. Johnson*, 249 U.S. 490, 492, 63 L. Ed. 722, 724, 39 S. Ct. 336:

"The jurisdiction of this court to review the final judgment or decree of the highest court of a state, in such a case as we have here is defined in §237 of the Judicial Code which provides that it shall be competent for this court, by certiorari, to require any such cause to be certified to it for review when there is claimed in it any title, right, privilege, or immunity under the Constitution of the United States and 'the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution.' It is the settled law that this provision means 'that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice, . . . and upon the question whether or not such a claim has been so asserted, the decision of the state court is binding upon this court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion, for the purpose of

> defeating the claim of Federal right.' Atlantic Coast Line R. Co. vs. Mims, 242 U.S. 532, 535, 61 L. Ed. 476, 478, 37 Sup. Ct. Rep. 188; Gasquet vs. Lapeyre, 242 U.S. 367, 371, 61 L. Ed. 367, 370, 37 Sup. Ct. Rep. 165, and cases cited.
>
> "No suggestion is or could be made, that the Missouri state supreme court's holding in this case was framed to evade the consideration of the Federal right now asserted, for it had long been the established law of that state that, under its system of practice, the construction of either the Federal or state Constitution would not be treated as involved in a case, in a jurisdictional sense, unless it appeared that such question was raised and ruled on in the trial court, and also that constitutional questions could not be injected into a case for the first time in an appellate court by argument or brief of counsel for the purpose of giving jurisdiction. . . ."

An early application of the principle that constitutional questions are waived if not seasonably raised is found in *State vs. Noel*, (1806) 1 Charlt. 43, 59 (1 Ga. Decisions), where it was held, based on Lord Mansfield's opinion in *Ballard vs. Bennett*, 2 Burr. 775, that the constitutionality of a state statute could not be determined on certiorari or other appellate process; specifically it was held as early as 1857 that objections to a jury panel as a whole were waived unless made prior to trial by challenge to the array (*Jordan vs. State*, 22 Ga. 545); and finally, added to this are the many Georgia decisions subsequent to the ratification of the Fourteenth Amendment stating the practically unanimous view that constitutional rights must be diligently asserted. Moreover, as recent as 1952, this court had occasion to recognize and apply the stringent require-

ments of Georgia law as to raising constitutional questions, as stated in *Persons vs. Lea*, 207 Ga. 384, 61 S.E. 2d 832. See *Stembridge vs. Georgia*, 343 U.S. 541, 96 L. Ed. 1130, 72 S. Ct. 834.

It is therefore an unusual argument to make, and a late day to make it, that the petitioner, by virtue of the Fourteenth Amendment and his color, is exempted from all procedural requirements of state law. Petitioner has had his day in court with ample opportunity to raise directly the questions he now pursues collaterally, and that decision was affirmed by the highest court of the state, from which no further review was sought. Of necessity, there must be a time when all litigation ceases; such is the impact, implicit, if not expressed, by that recent *cause celebre*, *Rosenberg vs. United States*, 346 U.S. 273, 97 L. Ed. 1607, 73 S. Ct. 1152. The idea receives its classical expression in *Whitney vs. California*, 274 U.S. 357, 362, 71 L. Ed. 1095, 1100, 47 S. Ct. 641:

> "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. Dewey vs. DesMoines, 173 U.S. 199, 43 L. Ed. 666, 19 Sup. Ct. Rep. 379; Keokuk & H. Bridge Co. vs. Illinois, 175 U.S. 634, 44 L. Ed. 302, 20 Sup. Ct. Rep. 205."

VII.

CONCLUSION

The decision of the Supreme Court of Georgia below having rested on the non-federal ground that state procedural requirements had not been complied with, this court is without jurisdiction and the writ should be dismissed. 28 U.S.C., Section 1257(3); *Loftus vs. Illinois*, 334 U.S. 804, 92 L. Ed. 1737, 68 S. Ct. 1212. No

independent due process attack having been made below against these procedural requirements on the ground of denial of sufficient corrective process, the question is not open for consideration here. *Foster vs. Illinois*, 332 U.S. 134, 139, 91 L. Ed. 1955, 1959, 67 S. Ct. 1716; *Hedgebeth vs. North Carolina*, supra.

Respectfully submitted,

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VIII.

APPENDIX

NEWSPAPER REPORTS OF *AVERY VS. STATE*, 209 Ga. 116, 70 S.E. 2d 716, and *Avery vs. Georgia*, 345 U.S. 599, 97 L. Ed. 1244, 73 S. Ct. 891

A.

Avery vs. State

1. *Atlanta Constitution*, Tuesday, April 15, 1952, p. 15.

SUPREME COURT PLEA REJECTED ON TWO-COLORED JURY SLIPS

By a 5-2 vote, the Georgia Supreme Court has ruled that the use of different colored slips for whites and Negroes in drawing prospective jurors in Fulton County is not enough to set aside the death sentence of a Negro convicted of rape.

James Avery, Walker County Negro, was tried in Fulton County on a change of venue. The jury found him guilty.

Avery's attorneys said Negroes were discriminated against in both the drawing of the trial and grand juries because their names were written on different colored slips and could be easily recognized at jury drawings.

The majority decision, written by Justice T. S. Candler, said the evidence was sufficient to support the verdict in the lower court.

Justice Lee B. Wyatt, who wrote the minority opinion, said "the practice is conclusive evidence of discrimination and for that reason, the case should be reversed."

The court was critical of the use of different colored slips, however. Justice T. Grady Head recommended it be discontinued as soon as possible.

2. *Atlanta Journal*, Tuesday, April 15, 1952, 5 Star Final, page 10.

DOOMED MAN LOSES PLEA ON JURY LIST

The State Supreme Court Monday upheld the conviction and death sentence of a Negro charged with rape. The defendant had appealed to the high court on the ground that the prepar-

ation of Fulton County jury lists discriminated against Negroes.

The doomed man is James Avery, who was charged with rape in Walker County in 1950 and tried in Fulton in 1951 on a change of venue.

Attorneys for Avery contended that Negroes are discriminated against in Fulton because a disproportionate number of Negroes are placed on the jury lists, and because the names of Negroes are placed in the jury box on yellow cards while the names of white jurors are on white cards.

Discrimination Denied

The Supreme Court held, however, that the evidence showed there was no discrimination in the drawing of the jury that tried Avery.

In the five-to-two majority opinion, written by Justice Thomas S. Candler, the court also noted that "jury service is not a right nor a privilege but a burden that the state summons certain of its citizens to bear, and upon no basis is appointment of jury duty required by the Constitution, the law or any decision which we have been able to find."

The court ruled there was no evidence to show the jury commissioners had "arbitrarily and systematically excluded upright and intelligent colored men because of race and color as contended."

In the particular case involved, the court held the placing of the names of jurors on different colored cards did no harm to the defendant.

Head Takes Exception

Justice T. Grady Head, in a special concurring opinion, however, said there is "neither constitutional nor statutory authority for the use of different colored paper in placing the names of colored jurors in the jury box," and added such a procedure "could serve only one purpose, to wit, discrimination . . ."

Justice Head declared "such practice is wrong and should be discontinued at the first opportunity to revise the jury lists."

Justices Atkinson and Wyatt dissented from the majority opinion and Justice Wyatt wrote there was "conclusive evidence of discrimination and for this reason the conviction should be reversed."

B.

Avery vs. Georgia

1. *Atlanta Constitution*, Tuesday Morning, May 26, 1953, Front Page Article.

COURT NULLS ALL-WHITE JURY VERDICT

WASHINGTON, May 25—(AP)—The Supreme Court set aside today the rape conviction against a Georgia Negro, holding there was evidence of discrimination against Negroes in the selection of the trial jury.

The Negro, James Avery, was convicted in Fulton County in September, 1951, and sentenced to death in the electric chair on conviction of the rape of a white woman.

His attorneys, in appealing to the Supreme Court, protested that jury commissioners of Fulton County printed names of prospective white jurors on white slips of paper and names of Negro jurors on yellow slips.

Chief Justice Vinson, who wrote the court's opinion, said there was not a single Negro on the panel of 60 from which the Avery jury was selected.

"Even if the white and yellow tickets were drawn from the jury box without discrimination, opportunity was available to resort to it at other stages in the selection process," the chief justice wrote. "And, in view of the case before us, where not a single Negro was selected to serve on a panel of 60—though many were available—we think that petitioner has certainly established a prima-facie case of discrimination."

Commented Justice Frankfurter, who wrote a separate concurring opinion:

"The stark resulting phenomenon here was that somehow or other, despite the fact that over 5 per cent of the slips were yellow, no Negro got on the panel of 60 jurors from which Avery's jury was selected. The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity."

2. *Atlanta Constitution*, Tuesday Morning, May 26, 1953, p. 6.

WEBB DOUBTS AVERY RULING MEANS UPSET

Fulton County Sol. Gen. Paul Webb said Monday he did not believe the Supreme Court's Avery case decision would result in a "serious upset to our system."

Other court observers, however, speculated that the effect of the ruling in the Avery case holding that discrimination had been practiced against the Negro may be that Fulton County indictments on which trial is pending could be attacked on the ground that grand juries also are drawn from different colored cards.

One court official said the Supreme Court's action would probably result in a meeting of judges and jury commissioners to discuss future policy.

The same spokesman pointed out that old cases in which convictions were obtained under the two-color jury selection system could not be reopened because objections must have been made at the time of the trial.

3. *Atlanta Journal*, Tuesday Evening, May 26, 1953, Final Home Edition, p. 11.

FULTON SEEN MOVING TO BAN DIFFERENT COLORED JURY SLIPS

Court Ruling Against Practice Draws Prediction of Action

The Fulton Jury Commission is expected to meet in the near future to abolish use of different colored jury-box slips for Negroes and whites.

Action by the jury commission was predicted Tuesday following a Monday ruling by the U.S. Supreme Court against the practice of listing white jurors on white slips and Negro jurors on yellow slips.

Court officials, however, said they see no profound change in the present method for selecting juries, since Negroes already serve on juries in Fulton County.

Thomas D. Body Sr., retiring chairman of the current jury commission, said Tuesday that the group has retired until September and that he has not discussed the matter with other members of the commission.

Judges of the Fulton Superior Court are expected, however, to ask the jury commission to reconvene after the judges have had ample opportunity to study the high tribunal's ruling.

The Supreme Court ruled on the jury slips in setting aside the conviction of James Avery, 22-year-old Negro truck driver who was sentenced to death in September, 1951, for the 1950 assault of a white woman near Chickamauga.

Judge E. E. Andrews, presiding judge, reserved comment on the ruling until he has had an opportunity to study the decision. He stated, however, that if the Supreme Court directs it, the custom will be changed.

Fulton Solicitor Paul Webb predicted little more change than the clerical work involved.

At present the jury list is taken from the tax digest by the commission. Negro jurors—who are listed on yellow paper in the tax office—are also listed on yellow jury slips while white people are listed on white slips.

All slips are kept in a master box where they are not arranged according to alphabet or race, but are "mixed up," court officials explained.

The slips are drawn from the master box in open court by judges hearing cases in either the superior, civil or criminal divisions. When drawn, the slips are handed from the judge to a deputy sheriff who in turn passes them to the court clerk.

The change to all-white slips will have no effect on cases already adjudicated but will effect cases now in progress where the point of different colored jury slips has been raised.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 412

AUBRY WILLIAMS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent

N WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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SUPREME COURT OF THE UNITED STATES

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AUBRY WILLIAMS,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

Opinions Below

The opinion of the Supreme Court of Georgia (R. 19-22) affirming the dismissal of petitioner's extraordinary motion for new trial is reported in 210 Ga. 665, 82 S. E. 2d 217. The judgment of the Superior Court of Fulton County (R. 16) dismissing that extraordinary motion is unreported. The earlier opinion of the Supreme Court of Georgia affirming petitioner's conviction of the offense of murder, which opinion is not drawn in question here, is reported in 210 Ga. 207, 78 S. E. 2d 521.

Jurisdiction

The petitioner has invoked the jurisdiction of this Court under 28 U. S. C. 1257(3) on the theory that the judgment below, dismissing the extraordinary motion for new trial and refusing to adjudicate petitioner's claim that he had been denied the equal protection of state laws, has deprived petitioner of a right or privilege claimed under the federal Constitution. The judgment of the Supreme Court of Georgia was entered on May 10, 1954 (R. 23), and a motion for rehearing was denied by an order dated May 31, 1954 (R. 23). The petition for a writ of certiorari was filed on July 9, 1954, and was granted by this Court on October 18, 1954 (R. 23).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are Section 1 of the Fourteenth Amendment to the Constitution of the United States; Article I, Paragraph V, of the Constitution of the State of Georgia; and Sections 59-801, 59-802, 59-803, 59-805, 70-204, 70-205, 70-208, 70-301 and 70-303 of the Georgia Code Annotated. They are printed in the appendix to this brief, *infra*, pp. 28-31.

Questions Presented

1. Whether this Court has jurisdiction to examine the circumstances surrounding the assertion of the federal question, the state court below having held that the assertion came too late under established rules of state procedure.

2. Whether petitioner's failure to assert his federal constitutional claim at the point prescribed by state procedure should be construed, for purposes of the federal Constitution, as a waiver or forfeiture of that claim under the unique circumstances of this case.

Statement of the Case

The facts of this case are undisputed and are correctly and adequately set forth in the briefs of the petitioner and of the respondent. In pertinent part, these facts may be summarized as follows:

Petitioner is a Negro. On October 21, 1952, he was indicted for the murder of a white man. Trial was held in the Superior Court of Fulton County on March 10, 1953, following which the all-white jury found petitioner guilty as charged. After a motion for new trial was overruled, petitioner appealed to the Supreme Court of Georgia. That court affirmed the conviction on October 14, 1953, finding no merit in the various assignments of error. *Williams* v. *State*, 210 Ga. 207, 78 S. E. 2d 521. The correctness of that decision is not involved in the instant case before this Court. Petitioner was thereafter (November 23, 1953) sentenced to death. (R. 16).

On December 1, 1953, petitioner filed in the Superior Court of Fulton County an extraordinary motion for new trial (R. 1) pursuant to Section 70-303 of the Georgia Code Annotated.[1] In this extraordinary motion was raised for the first time the contention that petitioner had been denied the equal protection of the state laws by reason of the circumstances attending the selection, organizing, impaneling and challenging of the jury sworn to try him—all in violation of the equal protection clause of the Fourteenth Amendment of the federal Constitution. More particularly, this motion alleged:

(1) The Fulton County jury commissioners had selected

[1] Under Georgia practice, ordinary motion for new trial must be made during the term at which trial is had but in any event within 30 days from the trial. Sec. 70-301, Georgia Code Ann. An extraordinary motion for new trial, such as was filed in this case, is one made any time after the term at which the trial is had. Sec. 70-303, Georgia Code Ann.

names of prospective trial jurors, printed the names of white persons on white tickets or slips of paper and the names of Negroes on yellow tickets or slips of paper, and placed all these tickets in the jury box, thus permitting the judge and other court officials deliberately to discriminate against Negroes in the drawing of jurors for any panel.

(2) The numerical proportion of Negroes to white persons placed on the jury panels and actually summoned for jury duty was excessively and systematically less than the proportion of Negro citizens to white citizens in Fulton County as a whole and excessively and systematically less than the proportion of Negroes to white persons whose names were placed in the jury box.

(3) More than 120 tickets were drawn from the jury box on February 18, 1953. Those whose names were thus drawn were to serve as petit jurors in both criminal and civil cases in the Superior Court of Fulton County during the week of March 9, 1953. From this number 10 panels of 12 petit jurors each were chosen; of these 120 persons only 4 were Negroes. Five of these panels were assigned to serve in criminal trials and all 4 Negroes were included in these panels. A panel of 48 of these jurors, including the 4 Negroes, were put upon petitioner. Three of the Negroes were excused for cause and the other was challenged peremptorily by the State, being the first juror thus challenged by the State. (R. 4-5).

(4) This system of selection made it possible to keep the number of Negro jurors selected for the panels within the six peremptory challenges allowed the State in any felony case and well under the ten such challenges allowed the State in a capital case.[2]

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[2] In this connection, the motion stated as follows (R. 4): "Movant shows that in the reported case of *Watkins* v. *State*, 199 Ga. 81, public speeches of the Solicitor General of another county here referred to, showing that

Attached to the motion were affidavits by the petitioner and his counsel,[3] stating that neither knew at the time of the trial on March 10, 1953, of the facts set forth in the extraordinary motion relative to the selection and impaneling of the jury panel. (R. 6-7).[4] His counsel added that such facts "could not have been discovered by him in the exercise of ordinary diligence" (R. 7).

Upon hearing, the Superior Court dismissed the extraordinary motion "for the reason that the grounds of the motion did not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion" (R. 16). The matter was then duly appealed to the Supreme Court of Georgia, the petitioner contending that the case was controlled by *Avery* v. *Georgia*, 345 U. S. 559. That court affirmed the dismissal of the extraordinary motion on two grounds:

(1) The law of Georgia requires that any challenge to the array of jurors be raised at the time the array is put upon the defendant and before the trial begins. Since petitioner had failed to make his challenge at that point "the objection is waived and can not thereafter be made a ground of a motion for new trial" (R. 21).

(2) The affidavits of petitioner and his counsel to the effect that they did not know of the facts as to the selection of the jury panel at the time of the trial and could not have discovered them in the exercise of ordinary diligence were

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he by design exercised the State's peremptory challenges to prevent negro jurors from serving on the trial of any cause in his court, and that this means is known to and available to all solicitors general, and may be made effective by control of the number of negro petit jurors summoned for jury service."

[3] Although the record before this Court does not so indicate, counsel had been appointed by the trial court to represent petitioner. This appointment was apparently made in November or December, 1952.

[4] These affidavits were filed in an attempt to comply with the requirements of Section 70-205 Georgia Code Ann.

insufficient to excuse petitioner from the necessity of presenting the challenge at the time the panel was put upon him. Moreover, said the court, the statements in these affidavits are contradicted by the fact that when this case came on for trial on March 10, 1953, *Avery* v. *State*, 209 Ga. 116, 70 S. E. 2d 716, had already been decided by the Supreme Court of Georgia and was then pending in the Supreme Court of the United States. The opinion of the Georgia court in the *Avery* case had fully explained the method of selecting jury panels in Fulton County to which petitioner now objected and due diligence would have required petitioner and his counsel to make themselves familiar with such a pertinent opinion. Thus the motion for new trial was not sufficient as an extraordinary motion for new trial (R. 22).

The Georgia court admitted (R. 22) that the system of jury selection set forth in the extraordinary motion was one "which has been condemned by this court and the Supreme Court of the United States." But, added the court, any such question "must be raised at the time and in the manner required under the rules of law and practice and procedure in effect in this State" (R. 22).

Summary of Argument

1. This Court clearly has jurisdiction to determine whether the federal right asserted in the state court may be lost by waiver and whether, under the particular circumstances, a waiver has in fact occurred. *Truax* v. *Corrigan*, 257 U. S. 312; *Parker* v. *Illinois*, 333 U. S. 571. The ruling of the state court as to waiver of the federal claim is not binding on this Court. *Davis* v. *Wechsler*, 263 U. S. 22; *Patterson* v. *Alabama*, 294 U. S. 600.

2. Despite petitioner's failure to challenge the jury panel when it was put upon him, the federal constitutional claim

he now asserts should not, in the circumstances, be considered waived for purposes of the federal Constitution.

(a) In a capital case, where a life is at stake, a constitutional claim should not be considered waived for light or unsubstantial reasons. The presumption against the waiver of fundamental rights, *Glasser* v. *United States*, 315 U. S. 60, 70, is peculiarly appropriate where a condemned person claims that he has been denied the equal protection of the laws, "for equal protection to all is the basic principle upon which justice under law rests." *Pierre* v. *Louisiana*, 306 U. S. 354, 358.

(b) A constitutional claim that goes to the very essence of a fair trial and which, if proved, would render the conviction constitutionally worthless should not be considered waived or forfeited for any but the most inexcusable of reasons. A claim that there has been racial discrimination in the selection of the jury panel in a criminal case is of that nature. Discriminatory exclusions from the panel of racial groups impregnate the whole fabric of the trial and make a mockery of the concept of trial by jury. *Strauder* v. *West Virginia*, 100 U. S. 303; *Pierre* v. *Louisiana*, 306 U. S. 354. Waiver of so basic an objection should be precluded where there are extenuating circumstances of a substantial and reasonable nature surrounding a failure to take advantage of a particular corrective process afforded by the state.

(c) The circumstances surrounding the failure to make a timely challenge to the jury panel show that such a challenge would have been futile. This futility springs from the fact that the challenge would have been denied by the Georgia trial court on the then prevailing authority of the Georgia Supreme Court in *Avery* v. *State*, 209 Ga. 116, 70 S. E. 2d 716. It was not until two months later, when this Court reversed that *Avery* ruling, that it first became clear that petitioner's challenge had any substance. Such seeming futility is an ameliorating circumstance that can, in cer-

tain situations, counterbalance the failure to pursue an available remedy. *Sunal* v. *Large*, 332 U. S. 174; *Bowen* v. *Johnston*, 306 U. S. 19. This case contains sufficient ameliorating circumstances, in addition to the factor of seeming futility, to warrant the conclusion that, for purposes of the federal Constitution, no waiver occurred. *Patterson* v. *Alabama*, 294 U. S. 600.

(d) So far as the record shows, petitioner and his counsel acted at all times in good faith. Under Georgia law there is no obstacle to a consideration of the merits of petitioner's extraordinary motion for new trial at this late date.

Argument

1. *This Court has jurisdiction to determine whether there has been a waiver of the federal constitutional claim*

It is urged by the State of Georgia, respondent herein, that the writ of certiorari should be dismissed as improvidently granted. The contention is that the decision below rests upon the adequate non-federal ground that the federal constitutional claim was raised too late under the requirements of state procedure. Hence it is said that there has been no determination of a federal issue which this Court can review.

But this argument misconceives the nature of petitioner's position before this Court and the scope of this Court's jurisdiction in cases of this character. Concededly, there has been no determination by the Georgia courts of the merits of the federal question raised in petitioner's extraordinary motion for new trial. He accordingly cannot and does not ask this Court now to resolve that federal question in the first instance or to hold that the system of selecting the jury panel in his case violated his right to the equal protection of the state laws.

Petitioner does claim, however, that his constitutional claim was wrongly dismissed and that the Georgia courts

should have passed upon the merits of that claim. And what he does seek from this Court is an examination of the circumstances surrounding the assertion of the federal constitutional question, circumstances which the courts below held to constitute a waiver or forfeiture of his claim.

This Court clearly has jurisdiction to make such an examination. Time and again that jurisdiction has been acknowledged in cases coming from state courts where the claim was that a federal right set up in the state court had been wrongly denied and where the state court had put its decision on a finding that the asserted federal right had no basis in fact or had been waived or lost under state procedure.[5] In those cases, this Court has emphasized its power to go behind such state court rulings to see whether they were without substantial support. As was said in *Truax* v. *Corrigan*, 257 U.S. 312, 324, "If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

This jurisdiction has frequently been invoked to determine whether the federal right asserted in the state court may be lost by waiver and whether, under the particular circumstances, a waiver has in fact occurred. *Parker* v. *Illinois*, 333 U.S. 571, 574; *Bute* v. *Illinois*, 333 U.S. 640, 675; *Carter* v. *Illinois*, 329 U.S. 173, 174-175; *Union Pacific R. Co.* v. *Public Service Commission*, 248 U.S. 67, 69-70. The ruling of a state court that as a matter of state practice

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[5] Thus in *Rogers* v. *Alabama*, 192 U.S. 226, a motion to quash the indictment because of unlawful discrimination in the selection of the grand jury had been stricken by the state court by application of a state statute and state practice permitting the striking of unnecessarily prolix motions. This Court reexamined the facts and found that the motion was not so unreasonably prolix as to permit its withdrawal from the consideration of this Court under color of local practice. Said Mr. Justice Holmes on behalf of the Court (p. 230): "It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

and procedure an asserted federal right has been waived does not bind this Court. In such a case this tribunal is free to analyze the facts and circumstances and reach its own conclusions as to waiver. *Davis* v. *O'Hara*, 266 U.S. 314, 318; *Ward* v. *Love County*, 253 U.S. 17, 22-23. To quote the words of Mr. Justice Holmes in *Davis* v. *Wechsler*, 263 U.S. 22, 24-25:

> If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* v. *Grand Lodge Knights of Pythias*, 225 U.S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.

It follows that this Court has jurisdiction to determine whether there has been a waiver of petitioner's constitutional claim and whether the Georgia procedural rules may properly be applied to bar a determination of the merits of that claim. And the writ of certiorari, far from being improvidently granted, is an appropriate and necessary vehicle for the exercise of that important jurisdiction. Only through that writ can it be determined if petitioner has been unfairly deprived of his right to press a serious constitutional claim. See *Patterson* v. *Alabama*, 294 U.S. 600.

II. *Petitioner's constitutional claim should not be considered waived under the unique circumstances of this case*

Despite petitioner's failure to challenge the jury panel when it was put upon him, the federal constitutional claim he now asserts should not be considered waived under the

unique facts and circumstances of this case. It is unnecessary here to question the reasonableness of the Georgia rule of practice requiring that challenges to jury panels be raised before the trial begins. Nor need criticism be made of the holding of the court below that the affidavits by themselves afforded no adequate basis under Georgia law for the granting of a new trial. But there is put in issue the problem whether there are substantial and sufficient extenuating circumstances outweighing the failure to raise the federal question at the point prescribed by Georgia law so that it fairly can be said that, for purposes of the federal Constitution, there was no waiver or forfeiture of the federal claim. Such circumstances, it is submitted, do exist in this case.

Indeed, the Supreme Court of Georgia in its opinion implicitly recognized that the main problem was whether there was a valid excuse for not having raised the federal question at the point specified by Georgia practice. After first restating the requirement that jury challenges must be made before trial, the court then turned to an inquiry into the reasons given for the failure to follow that requirement. It looked to the affidavits stating that petitioner and his counsel did not know of the relevant facts at the time of the trial and could not have discovered such facts in the exercise of ordinary diligence. The court held that these statements, being mere opinion and not presenting sufficient facts to permit judgment as to whether due diligence had been exercised, were inadequate to support an extraordinary motion for new trial under Georgia law. Moreover, these statements were held to be contradicted by the "facts and circumstances." (R. 22). The "facts and circumstances" referred to involved the earlier decision of the court in *Avery* v. *State*, 209 Ga. 116, 70 S.E. 2d 716, which had set forth the pertinent facts relative to the selection of jury panels in Fulton County. Only after this inquiry into the affidavits and the surrounding "facts and circum-

stances" did the court below finally conclude that there was no error in dismissing the extraordinary motion for new trial. Only then did it finally conclude that "When this defendant failed to raise this question when the panel was put upon him, he waived the question once and for all." (R. 22).

Necessarily, had the court below believed that the reasons advanced in the affidavits or gathered from the surrounding facts and circumstances constituted adequate excuses for not challenging the jury panel when it was put upon the petitioner, relief would have been forthcoming. At least a hearing would have been ordered upon the facts alleged in the extraordinary motion for new trial. Hence it becomes incumbent upon this Court, as it was upon the court below, to examine into the facts and circumstances surrounding the failure to raise the federal question at the point specified by Georgia law to determine if, for purposes of the federal Constitution, there has been a waiver "once and for all" of the federal constitutional claim.

a. *The capital nature of this case*

It is pertinent to note preliminarily that the petitioner has been sentenced to death. If the judgment below is allowed to stand, he will forfeit his life in accordance with the sentence duly imposed upon him.

Needless to say, constitutional rights may be waived or lost as readily in a capital case as in a non-capital case by virtue of a failure to follow prescribed rules of state procedure. See *Brown* v. *Allen*, 344 U. S. 443, 485-487. But the fact that the individual's life is at stake makes it all the more important that constitutional rights be not considered waived for light or unsubstantial reasons. A human life should not be snuffed out until we are emphatically sure that all constitutional claims have been resolved or have been inexcusably waived or forfeited.

The capital nature of this case, moreover, makes peculiarly appropriate the principle stated in *Glasser* v. *United States*, 315 U. S. 60, 70, that "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." See also *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389; *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292. Thus when an individual condemned to death claims that he has been denied the equal protection of the laws on account of his race, a waiver should not be easily presumed but should be clear and unequivocal. A court then has a solemn duty to inquire into the facts surrounding an alleged waiver of so fundamental a claim, "for equal protection to all is the basic principle upon which justice under law rests." *Pierre* v. *Louisiana*, 306 U. S. 354, 358. An accused person should not go to his death with a substantial doubt remaining as to whether "justice under law" has been accorded or waived.

b. *The substantiality of petitioner's constitutional claim*

If proved, the facts stated in petitioner's extraordinary motion for new trial establish a clear violation of his right to the equal protection of the state laws as guaranteed him by the Fourteenth Amendment. That motion sets forth facts substantially identical with those before this Court in *Avery* v. *Georgia*, 345 U. S. 559.

In the *Avery* case this Court held that the very practice complained of by the petitioner in this case—the use in Fulton County of yellow and white tickets to distinguish between white and Negro jurors—was an open invitation to practice unlawful discrimination at some stage in the jury selection process. And the fact that under such a system none of the panel of 60 jurors in the *Avery* case was a

Negro was held to establish a prima facie case of discrimination. Here there were only 4 Negroes among 120 jurors chosen, all 4 being included among the 48 jurors put upon the petitioner. In both cases the panels were drawn from a jury box that permitted easy discrimination. In one instance, no Negroes were selected; in the other, only four. In both instances a much greater percentage of Negroes was available for service and would have been selected under the mathematical laws of chance had discrimination not occurred.[6] It may fairly be said that where there is a mode of jury selection that is inherently susceptible to discrimination and abuse, as is true in this and the *Avery* cases, any substantial deviation between the proportion of Negroes chosen on the jury panels and the proportion of Negroes eligible for jury service is prima facie proof of discrimination.

The critical factor in the *Avery* case was the inherently discriminatory system of jury selection. And that factor is allegedly present in this case. As the Supreme Court of Georgia admits in its opinion below (R. 22), "Defendant in his motion sets forth a practice which has been condemned by this court and the Supreme Court of the United States.[7]

The constitutional claim thus made by the petitioner

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[6] In the *Avery* case, this Court noted (345 U.S. at 561), "The State concedes that Negroes are available for jury service in Fulton County, and we are told that Negroes generally do serve on juries in the courts of that county." The opinion of the Supreme Court of Georgia in the *Avery* case (209 Ga. at 120, 70 S.E. 2d at 720) also pointed out that: "It is a common occurrence for both white and colored jurors to serve. Five colored grand jurors served at the July-August, 1951, term of Court. An entire panel or more of colored traverse jurors sometimes serves."

[7] The brief of the state of Georgia, respondent herein, notes (p. 6) that after this Court's decision in the *Avery* case the Superior Court of Fulton County carried into effect the mandate of this Court and completely revised the jury boxes, presumably eliminating the use of yellow and white tickets.

is not a frivolous or empty one.[8] It is a claim that, if proved, affects the very essence of trial by jury and our traditional concepts of justice.[9] The right to a trial by jury for an alleged offense against the laws of Georgia is guaranteed petitioner by the Constitution of Georgia [10] and equality in the application of that constitutional provision is guaranteed petitioner by the Fourteenth Amendment.[11] Fair selection and constitution of a jury to try petitioner are essential parts of the protection that such a mode of trial is intended to secure. "The very idea of a jury," said this Court in *Strauder* v. *West Virginia*, 100 U. S. 303, 308, "is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

Once particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service "indictment by grand jury and trial by jury cease to harmonize with our traditional concepts of justice." *Pierre* v. *Louisiana*, 306 U. S. 354, 358. Such a discriminatory exclusion impregnates the whole fabric of the trial and makes a mockery of the concept of trial by jury. The trial then becomes not by a jury of one's peers or equals but by a jury of one's alleged superiors who may

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[8] In view of the substantiality of the petitioner's claim based upon the use of white and yellow tickets, the significance of the claim as to discriminatory use of peremptory challenges need not be reached.

[9] "An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses." *Akins* v. *Texas*, 325 U.S. 398, 400-401.

[10] "Every person charged with an offense against the laws of this State . . . shall have a public and speedy trial by an impartial jury." Constitution of the State of Georgia, Article I, Paragraph V.

[11] And see also 18 U.S.C.A. § 243.

well be prejudiced. As this Court said in *Strauder* v. *West Virginia*, 100 U. S. 303, 309:

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. . . . The framers of the constitutional Amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was, doubtless, a motive that led to the Amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided . . .

Because racial discrimination in the selection of jurors so corrodes the concept of trial by jury, a verdict rendered by a discriminatorily selected jury cannot be respected and cannot stand. It is not a verdict which the Fourteenth Amendment permits to be recognized. Accordingly, when convinced that discrimination has been proved in a particular case, this Court has unhesitatingly reversed criminal convictions regardless of the guilt of the accused. "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." *Smith* v. *Texas*, 311 U. S. 128, 132; and see *Martin* v. *Texas*, 200 U. S. 316, 319; *Carter* v. *Texas*, 177 U. S. 442, 447. The conviction itself becomes a denial of equal protection. *Smith* v. *Texas*, *supra*, 129-130.

Petitioner's claim is thus more than a procedural or technical objection. It is more than an alleged error of law. If the jury panel was in fact discriminatorily selected, the whole proceeding leading to his conviction became a

mask in constitutional theory. Cf. *Moore* v. *Dempsey*, 261 U. S. 86. The jury was so constitutionally suspect, so likely to possess the elements of prejudice, that its verdict is constitutionally defective. That verdict, which petitioner must satisfy with his life unless reversed, was a denial to him of the equal protection of the Georgia laws.

A claim that so fundamentally affects the fairness which is the major and historic characteristic of trial by jury should not be considered waived or forfeited for any but the most inexcusable of reasons. Such a basic defect in the procedure leading to the execution of petitioner is not easily overlooked merely because petitioner failed to follow a rule of state practice, however reasonable that rule. Perfection in the state's machinery for correcting constitutional faults does not alone cure a faulty trial and conviction. Nor does the failure of the accused to take advantage of that machinery cause the evaporation of the poison of prejudice which presumably saturated the trial and verdict by virtue of the alleged discrimination. Only if the failure to take advantage of a particular corrective process is intentional, in bad faith or inexcusable, and is not outweighed by any substantial extenuating circumstances, should a waiver or forfeiture be permitted. There was no such failure in this instance and hence, for purposes of the federal Constitution, there was no waiver.

The constitutional command of equal protection is strong. In a capital case it is not easily waived. Only the most compelling of circumstances should permit the conclusion that an individual has in effect waived all objection to the deprivation of his life by a process which denied him the equal protection of the laws and which rendered his conviction constitutionally worthless. The right to a *fair* trial by jury, which Blackstone called "the grand bulwark" of our liberties, is too precious to be considered waived for any technical or slight reason.

c. The futility of a timely challenge

The particular circumstances surrounding petitioner's failure to challenge the jury panel at the point required by Georgia law reveal the significant and substantial fact that a challenge at that particular point would have been fruitless. This futility springs from the certainty that a challenge at the appropriate time—i.e., when the panel was put upon the petitioner just prior to the trial on March 10, 1953—would have been denied on the authority of the then prevailing decision of the Supreme Court of Georgia in *Avery* v. *State*, 209 Ga. 116, 70 S. E. 2d 716.

The situation as it existed on March 10, 1953, can best be illustrated by a comparative chronology of events in the *Avery* case and the instant case:

Avery case	*Williams* case
April 14, 1952 — Georgia Supreme Court decision holding that the practice of using white and yellow tickets in Fulton County was prima facie evidence of discrimination but, in absence of proof of actual discrimination in drawing the challenged jurors, "furnished no sufficient objection to the jurors challenged by the accused." 209 Ga. 116, 70 S.E. 2d 716.	
July 28, 1952 — petition for writ of certiorari filed in United States Supreme Court.	
	October 21, 1952—indictment returned, charging petitioner with crime of murder.

Avery case

March 9, 1953 — writ of certiorari granted by United States Supreme Court.

April 30, 1953 — oral argument of case before United States Supreme Court.

May 25, 1953 — opinion of United States Supreme Court reversing Georgia court and holding that *practice of using white* and yellow tickets, when combined with absence of Negroes on particular panel, established a prima facie case of discrimination which was sufficient unless rebutted by the State. 345 U.S. 559.

Williams case

March 10, 1953—panel of 48 jurors put upon petitioner, at which point he should have challenged panel under Georgia law; trial and conviction immediately followed.

June 29, 1953 — amendment to motion for new trial filed, which did not mention constitutional claim concerning selection of jury panel.

October 14, 1953—conviction affirmed by Georgia Supreme Court, constitutional claim not being involved or decided. 210 Ga. 207, 78 S.E. 2d 521.

Williams case	*Avery* case
	November 23, 1953—defendant sentenced to death.
	December 1, 1953 — extraordinary motion for new trial filed in trial court, raising for first time the constitutional issue as to discriminatory method of selecting jury panel.
	January 18, 1954 — extraordinary motion for new trial dismissed by trial court since it "did not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion."
	May 19, 1954—affirmance of dismissal of extraordinary motion, the Georgia Supreme Court holding that the constitutional issue should have been raised before trial on March 10, 1953. 210 Ga. 665, 82 S.E. 2d 217.

Thus on March 10, 1953, a trial judge of the Superior Court of Fulton County would have been obliged to follow and apply the ruling of the Supreme Court of Georgia in the *Avery* case. The fact that the *Avery* case was then pending on certiorari in this Court, the writ having been granted on the previous day, did not make that Georgia decision any less applicable for an inferior Georgia court on March 10, 1953. Nor was that decision drained of relevance on that particular day because it was subsequently reversed by this Court.

Assuming, as we must, that any challenge petitioner might have presented on March 10, 1953, would have been the same as that now embodied in his extraordinary motion for new trial, a dismissal of the challenge would have been certain. Petitioner's claim contains no offer of proof beyond what was proved or offered in the *Avery* case. Petitioner here, in the words of the Georgia court in the *Avery* case, has "not charged or contended that any discrimination was practiced in drawing the challenged jurors." Accordingly, the Georgia court's conclusion in the *Avery* case would have followed: "Therefore, the practice of placing the names of white and colored jurors in the jury box on tickets of different colors did no harm in this instance, and consequently furnished no sufficient objection to the jurors challenged by the accused." 209 Ga. at 124, 70 S.E. 2d at 722.

It was not until more than two months later, on May 25, 1953, when this Court reversed the Georgia ruling in the *Avery* case, that it became clear for the first time that Avery's challenge and hence petitioner's claim constituted a sufficient objection. Then only would a Georgia trial judge have been obliged to disregard the ruling of the Supreme Court of Georgia in the *Avery* case and to hold that a challenge similar to that made by Avery was sufficient and, if proved and not adequately rebutted, established a prima facie case of discrimination. But by that time the opportunity for filing such a challenge in petitioner's case had lapsed under state procedure. Application of the state rule requiring challenges to be made before trial would have barred any challenge made by petitioner for the first time after the *Avery* ruling of this Court on May 25, 1953—whether by way of a motion for new trial,[12] an appeal from the conviction to

[12] Respondent's brief in opposition to the petition for certiorari suggests (pp. 5-6) that the extraordinary motion for new trial was defective in that it failed to allege that the facts sought to be raised therein were unknown to petitioner at the time of filing the amendment to the original

the Supreme Court of Georgia, or an extraordinary motion for new trial.

The statement of the court below that petitioner's counsel, in the exercise of ordinary diligence, should have known of the *Avery* ruling of that court and all the facts therein set forth need not be questioned. Even had he actually known of that ruling and even had he presented the challenge at the proper time, the challenge would have been futile. True, he could and doubtless should have raised the challenge anyway and preserved the point for purposes of appeal. But the important fact is that the challenge, if made on March 10, 1953, would have been denied under the Georgia law as it then stood and any lawyer who knew or should have known of the *Avery* decision of the Georgia court also knew or should have known of the futility of such a challenge on that day.

The seeming futility of taking a procedural step and raising an issue that is certain to be dismissed is an ameliorating circumstance that can, in certain situations, counterbalance the failure to pursue an available remedy. Thus in *Sunal* v. *Large*, 332 U.S. 174, the defendants had failed to appeal their convictions because the prevailing climate of opinion in the appellate courts seemed to foreclose any possible recognition of their claimed right to offer certain evidence at their criminal trials. This Court refused to permit them to raise the issue in later habeas corpus proceedings despite the fact that an intervening decision of the Court in another case had demonstrated the merit of the defendants' claim. The Court applied the normal rule that "since they

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motion for new trial on June 29, 1953. Aside from the fact that the Supreme Court of Georgia did not base its decision on such a point, it is obvious that had petitioner raised the constitutional objection in the original motion for new trial the effort would have been held to be too late under Georgia practice. The central issue remains whether there is an excuse, for purposes of the Federal Constitution, for not having raised the objection before trial on March 10, 1953.

chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." (332 U.S. at 181). But the opinion was careful to point out that the error claimed by the defendants "does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court." (332 U.S. at 182). In other words, had the claim of the defendants been that some constitutional right of theirs had been invaded the seeming futility of appealing their convictions might well have been considered a sufficient excuse, thereby permitting the issue to be raised at a later point and avoiding a miscarriage of justice.

And in *Bowen* v. *Johnston*, 306 U.S. 19, the "uncertainty and confusion . . . whether offenses within the . . . National Park are triable in the state or federal courts" were held to be "exceptional circumstances" surrounding the failure to appeal a conviction. A subsequent raising of this jurisdictional issue was accordingly permitted in a habeas corpus proceeding. See also *Hans Nielsen, Petitioner*, 131 U.S. 176; *Ex parte Wilson*, 114 U.S. 417; *Ex parte Bain*, 121 U.S. 1; *Callan* v. *Wilson*, 127 U.S. 540; *Johnson* v. *Zerbst*, 304 U.S. 458, 463, 468; *Walker* v. *Johnston*, 312 U.S. 275.

It thus is clear that the seeming futility of raising a constitutional claim at a particular point can serve as an extenuating circumstance and can be extraordinary enough in nature to preclude a finding of irrevocable waiver. Recognition of the factor of futility in such a situation is not condonation of the failure to pursue the proper procedural step. Rather it is an acknowledgment that certain constitutional commands may on occasion require something more than an application of state rules of procedure. It is part of the process of exercising this Court's appellate jurisdiction to make sure that miscarriages of justice do not occur in the name of the federal Constitution. As was said in *Patterson* v. *Alabama*, 294 U. S. 600, 607, "We have fre-

quently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires."

And so in this case we can put to one side the undeniable fact that petitioner and his counsel failed to challenge the jury panel put upon petitioner on the day of his trial. Under Georgia law, that failure constituted a waiver of any challenge. But whether such a waiver should be recognized for purposes of the federal Constitution is quite another matter, at least where the so-called waiver occurs under exceptional circumstances. The decision in *Patterson* v. *Alabama*, *supra*, illuminates this situation. There the Court felt bound to follow the ruling of the Alabama court that the petitioner had filed his motion for new trial and bill of exceptions too late under state law to permit that court to inquire into the federal constitutional issue as to the exclusion of Negroes from the grand and petit juries. But, said the Court (294 U. S. at 605), "While we must have proper regard to this ruling of the state court in regard to its own appellate procedure, we cannot ignore the exceptional features of the present case. An important question under the Federal Constitution was involved, and, from that standpoint, the case did not stand alone." The Court then went on to examine other exceptional features in the case, including the fact that the Court had just reversed the Alabama court in a companion case involving precisely the same issue. As a result, this Court remanded the *Patterson* case to the Alabama court so that it might reexamine the matter in light of the new situation.[13]

The parallel between the *Patterson* case and the instant one is striking. In both cases the petitioner was sentenced

[13] On remand, the Alabama court quashed the indictment against Patterson. Boskey and Pickering, *Federal Restrictions on State Criminal Procedure*, 13 Univ. of Chicago L. Rev. 266, 270 (1946).

to death. In both cases the petitioner raised a serious constitutional issue involving the exclusion of Negroes from the jury panel, an issue that goes to the very essence of a fair trial and our basic concepts of justice. In the *Patterson* case the issue was held to have been waived in the state appellate court because of a failure to file a motion for new trial and a bill of exceptions in time. Here the issue was held to have been waived for failure to raise it at the point the jury panel was put upon petitioner. The exceptional circumstances that were found to counterbalance the waiver in the *Patterson* case were the importance of the federal issue and the fact that the Court had just reversed judgment in a companion case which shared the same record and raised the same issue.

The exceptional circumstances present here are certainly no less compelling than in the *Patterson* case. Until this Court rendered its decision in the *Avery* case, raising petitioner's objection to the jury panel seemed a futile and useless gesture. At the point petitioner should have raised the issue under state procedure, he could not have received any relief on the basis of the then prevailing law. The trial judge would have had to act without the benefit of this Court's ruling in the *Avery* case. Had such a timely objection been made, therefore, it would have been dismissed; trial and conviction would have followed; and an appeal renewing the federal question could have been made. If the case came to this Court in that posture, realistically the situation would be indistinguishable from what it is now—i.e., this Court would be faced with the problem of whether, after a trial and conviction, a hearing should now be had on the merits of the challenge to the jury panel. Obedience to the command of equal protection requires such a hearing in the present posture of the case.

Under the unique circumstances of this case, the federal question should not be considered waived. The constitu-

tional principle of equal protection is too important to be lost in the confusion that naturally attended the long course of litigious development of the *Avery* case.

d. *Practical considerations*

It is also relevant to note that there is no indication in the record or in the opinion below that petitioner or his counsel deliberately falsified their affidavits. So far as the record shows, their statements that they did not know of the facts regarding the selection of the jury panel were made in good faith. Nor is there any basis for inferring that petitioner or his counsel is seeking to utilize dilatory tactics by deferring the constitutional issue until after other issues have been exhausted. And permitting a determination of that federal issue at this point will be no more upsetting of state procedure than had the issue been timely raised, denied and pursued on appeal.

Moreover, there are no jurisdictional hurdles confronting a determination of the merits of petitioner's constitutional claim by the Georgia courts at this late date. Under Georgia law, an extraordinary motion for new trial is addressed to the sound discretion of the trial judge, whose judgment will not be disturbed except for an abuse of discretion. *Parks* v. *State*, 204 Ga. 41, 46, 48 S. E. 2d 837. And a state statute (Georgia Code Ann., Sec. 70-208) explicitly provides that in all applications for a new trial on grounds not specified in the code the presiding judge must exercise a sound legal discretion in granting or refusing the same "according to the provisions of the common law and practice of the courts." Indeed, the opinion of the court below, by inquiring into the reasons advanced for the failure to make a timely challenge, necessarily recognizes the appropriateness of the extraordinary motion under these circumstances.

There do not appear to have been any prior Georgia cases involving an effort to secure a new trial on the basis of

an issue waived under state but not federal law. But if this Court sees fit to hold that, for purposes of the federal Constitution, there has been no waiver, the Georgia courts would then be exercising their normal jurisdiction over extraordinary motions for new trial, a jurisdiction that is always subject to the superior demands of the federal Constitution. And there are relevant federal cases holding that, in the exercise of discretion, a trial judge may grant a new trial if convinced of a harmful error even though no exception or objection as to the point in question was made at the original trial. *United States* v. *340 Acres of Land*, 54 F. Supp. 457 (S.D. Ga.); *United States* v. *Trollinger*, 81 F. 2d 167 (C.C.A. 4).

Conclusion

For the foregoing reasons, the conclusion follows that petitioner has not waived his claim under the equal protection clause of the Fourteenth Amendment. Even though the failure to challenge the jury panel before trial constituted a waiver under Georgia law, the unique circumstances of this case require that, for purposes of the federal Constitution, such waiver not be recognized.

The judgment below should accordingly be reversed and the case remanded to the Superior Court of Fulton County so that a hearing may be had on the merits of petitioner's extraordinary motion for new trial.

Respectfully submitted,

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APRIL, 1955.

APPENDIX

1. Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Constitution of the State of Georgia, Article I, Paragraph V:

> Every person charged with an offense against the laws of this State . . . shall have a public and speedy trial by an impartial jury.

3. Georgia Code Annotated, Section 59-801:

> *Panel of 48 jurors in felony trials; tales jurors.* When any person shall stand indicted for a felony, the court shall have impaneled 48 jurors, 24 of whom shall be taken from the two panels of petit jurors, from which to select the jury . . .

4. Georgia Code Annotated, Section 59-802:

> *Putting panel on prisoner.* The clerk shall make out three lists of each panel, and furnish one to the prosecuting counsel, and one to the counsel for the defense. The clerk shall then call over the panel, and it shall be immediately put upon the accused.

5. Georgia Code Annotated, Section 59-803:

Challenge to the array. The accused may, in writing challenge the array for any cause going to show that it was not fairly or properly impaneled, or ought not to be put upon him; the sufficiency of which challenge the court shall determine at one. If sustained, a new panel shall be ordered; if not sustained, the selection of jurors shall proceed.

6. Georgia Code Annotated, Section 59-805:

Peremptory challenges, number. Every person indicted for a crime or offense which may subject him to death or imprisonment in the penitentiary for not less than four years may peremptorily challenge 20 of the jurors impaneled to try him, and every person indicted for an offense which may subject him to imprisonment in the penitentiary for any time less than four years may peremptorily challenge 12 of the jurors impaneled to try him; and the State shall be allowed one-half the number of peremptory challenges allowed to the prisoner.

7. Georgia Code Annotated, Section 70-204:

Newly-discovered evidence. A new trial may be granted in all cases when any material evidence, not merely cumulative or impeaching in its character, but relating to new and material facts, shall be discovered by the applicant after the rendition of a verdict against him, and shall be brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial.

8. Georgia Code Annotated, Section 70-205:

Same; affidavit of movant; contents. When a motion for new trial is made on the ground of newly-dis-

covered evidence, it must appear by affidavit of the movant and each of his counsel that they did not know of the existence of such evidence before the trial, and that the same could not have been discovered by the exercise of ordinary diligence . . .

9. Georgia Code Annotated, Section 70-208:

Grant on other grounds; exercise of discretion by court. In all applications for a new trial on other grounds, not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts.

10. Georgia Code Annotated, Section 70-301:

Time of application; hearing, etc., in vacation; brief of evidence. All applications for a new trial, except in extraordinary cases, shall be made during the term at which the trial was had; and when the term shall continue longer than 30 days, the application shall be filed within 30 days from the trial, together with a brief of evidence, subject to the approval of the judge and subject to the right of amendment allowed in applications for a new trial; but all applications herein provided for may be heard, determined, and returned in vacation.

11. Georgia Code Annotated, Section 70-303:

Motion made after adjournment of court. In case of a motion for a new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the court. In all such cases, 20 days' notice shall be given to the opposite party. When-

ever a motion for a new trial shall have been made at the term of trial in any criminal case and overruled, or when a motion for a new trial has not been made at such term, no motion for a new trial from the same verdict shall be made or received, unless the same is an extraordinary motion or case, and but one such extraordinary motion shall be made or allowed.

(1201-3)